

1 John W. Kim (Cal. SBN 216251)
Financial Services and Bankruptcy Law Group
2 601 S. Figueroa St., Suite 4050
Los Angeles, California 90017
Telephone: (213) 292-6441
3 Email: johnkim@jwklawgroup.com

4 Attorneys for Petitioning Creditors
Warren Havens and Polaris PNT BNC (a Delaware Public Benefit Corp.)

5
6 **UNITED STATES BANKRUPTCY COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION**

8 In re:

Case No.: 16-42363 CN

9 LEONG PARTNERSHIP,

Chapter 11

Putative Debtor.

10 **DECLARATION OF WARREN HAVENS RE**
PETITIONERS' STATUS REPORT AND NOTICE
TO PARTIES-IN-INTEREST

11
12 I, Warren C. Havens, hereby declare:

13 1. I have personal knowledge of the matters set forth herein and if called upon to do,
14 I could and would, competently testify as to them. I submit this concurrently with the
Petitioners' Status Report and Notice to Parties-In-Interest ("Status Report")¹.

15 2. Attached as **Exhibit 1** hereto is a true and correct copy of the Havens
16 "Opposition to Motion of Receiver for an Order Approving Sale of Wireless Spectrum Assets to
17 PTC-220 LLC" filed in the State Action on October 14, 2016 (which is after the petition was
18 filed in this bankruptcy case, or "post petition"). The "**PTC220 License Sale**" is described in
Exhibit 1. (It is a complete copy which includes, as the attachment, sections on Collier on
19

20 ¹ All capitalized terms not defined herein shall have the meaning ascribed to them in the Status
Report.

1 Bankruptcy so that parties who receive a copy of the Status Report, or who review PACER, will
2 not have concerns as to information missing in an incomplete copy.)

3 3. Attached as **Exhibit 2** hereto is a true and correct copy of the Havens “Opposition
4 to Receiver’s Motion to File...Under Seal” filed concurrently with Exhibit 1 in the State Action.
5 *Both Exhibits 1 and 2 describe alleged violations of the automatic stay caused by the PTC220
6 License Sale” matter: the sale contract, the motion to get court approval of the same and related
7 matters.*

8 4. Reasons I object to the PTC220 License Sale matter, *in addition to violation of*
9 *the automatic stay*, were demonstrated by me, via my counsel in the State Action, to the
10 Receiver, to Mr. Leong and to the state court in the recent past. While the details and documents
11 of that demonstration may be presented in this case in a future motion by the Petitioners, in sum,
12 the objections demonstrated that the Receiver put this licensed spectrum (and all of the spectrum
13 of all of the FCC licenses of each Receivership company) into extreme and increasing jeopardy,
14 and communicated that to the market, and one result of that is shown in the price and terms of
15 this PTC220 License Sale: It involves a sale at multiples less in price than the minimum fair
16 market price, and with other adverse terms as compared with fair transactions. I know this since
17 I negotiated and closed all licenses sales and leases for this class of licenses-- AMTS 220 MHz-
18 range licenses-- in the nation, and I showed that to the Receiver before she proceeded with this
19 sale, but to no avail. In addition, she would not communicate with me on this matter, as the state
20 court instructed her to do.²

21 4a. Attached as **Exhibit 6** hereto is a true and correct copy of the Havens
“Memorandum of Points and Authorities in Opposition to Receiver’s Motion for an Order
Approving Sale and Lease of Wireless Spectrum Assets to Alstom Signaling Operation, LLC”

22 ² In addition, Skybridge Spectrum Foundation and I assert and purport to show in formal FCC
filings that the Receiver did not apply for and receive valid FCC approval of control over any of
the FCC licenses under the Receivership, and the Receivership Order’s assertions of control over
the licenses *prior* to FCC approval is against and void under FCC law. This challenge is pending
before the FCC at this time.

1 (redacted public version) also filed in the State Action, post petition. This involves the “**Alstom**
2 **License Sale**” matter further described in Exhibit 6. As indicated in Exhibit 6, I objected to the
3 Alstom License Sale matter in the State Action as being adverse to the interests of the seller
4 entities and public policy, *in addition it being a violation of the automatic stay.*^{3 / 4} The state
5 court approved of the Receiver’s motion to approve the Alstom License Sale, post-petition over
6 my objections, including that it violated the automatic stay.

7 5. Attached as **Exhibit 3** hereto is a true and correct of an email from the legal
8 counsel for the Receiver to my legal counsel in the State Action explaining that the Receiver has
9 no plans to seek any reconsideration of an FCC order regarding this MCLM-SCRRA License
10 sale matter. This relates to the “MCLM-SCRRA License Sale” matter described in the Status
11 Report. In this matter, the Receiver abandoned a valuable claim, in the “8-figure range,” well-
12 established in FCC proceedings and decisions, that is also property of the Debtor’s estate, to all,
13 or at least a substantial portion of, the licensed radio spectrum that a company called Maritime
14 Communications/Land Mobile LLC (“MCLM”) is selling to the public passenger railroad called
15 “SCRRA” (also called “Metrolink”- the major Southern California passenger railroad).

16 6. Attached as **Exhibit 4** hereto is a true and correct copy, in relevant part, of the
17 Receiver’s “Statement of Receiver Re Status of Leong Partnership Bankruptcy and Further FCC
18 Filings by Defendant Warren Havens” filed in the State Action. It presents the view of the
19 Receiver and her attorneys at the Sheppard Mullin law firm that the automatic stay does not
20 apply to the Receivership court action based on the Receiver’s position, as I understand this to

21 ³ This includes, *inter alia*, that in this Alstom License Sale matter: (i) the Receiver withheld
from me, in the meaningful time, material sale-contract information (including important
schedules and information on them) only providing this, or some of this, to me after the period
for me to oppose the sale motion had passed; (ii) the Receiver was exposing the seller entities to
potential major financial liabilities; and (iii) the Receiver has been using and continued use the
cash and assets of Skybridge Spectrum Foundation, a nonprofit corporation under I.R.C.
§501(c)(3), to unlawfully benefit the Receiver and Mr. Leong against the sole lawful purpose
under IRS and State law: for this Foundation’s non-profit purposes granted by the IRS and
accepted by the State.

⁴ See also footnote 2 above.

1 mean, that the Debtor can continue using its property in the “gap period.” However, I am not
2 aware of any *direct* admissions or statements by the Receiver that she is an agent or
3 representative of the putative Debtor, the Leong Partnership. The Receiver is experienced in
bankruptcy matters, as her website explains. See: <http://www.ueckerassoc.com/>.

4 7. In legal proceedings, Mr. Leong via counsel and his partners Mark Griffith and
5 Channing Jones, each destroyed and concealed principal evidence, shown in their own
6 admissions and other writings, and avoided depositions and document discovery. I described
7 that in “Statement 1” to my original declaration in support of this involuntary bankruptcy case
[Dkt. No. 11]. For this and other good cause, I have asked counsel to include in the Report a
notice to interested parties to preserve evidence.

8 8. Attached as **Exhibit 5** hereto is a true and correct of an email from the legal
9 counsel for the Receiver to the California state court staff, copying my legal counsel, in the State
10 Action requesting a reservation of hearing dates on November 15 and November 22, 2016,
11 because the Receiver plans to file motions for approval of: (i) 3 sales of Receivership “estate
12 property,” each one of which will liquidate (in the “fire-sale” situation caused by the
13 Receivership) of major FCC-licenses property and other property of Receivership entities; (ii) a
14 settlement agreement with a third party, Puget Sound Energy, Inc., that involves claims and
15 rights of certain of the Receivership entities to cash and other highly valuable assets;⁵ and (iii)
the Receiver’s recent financial reports and fee requests, to be paid out of any of the Receivership
entities’ cash assets.

17 ⁵ The state court previously denied the Receiver’s first motion for approval of her first
18 settlement agreement with Puget Sound Energy (“PSE”), including because it gave up valuable
19 claims not relevant to the underlying dispute and greatly exceeded the full demand of PSE. The
20 Receiver has now apparently revised the first settlement agreement and intends to seek court
approval of it. However, the Receiver’s last version (a revision of the first) sent to me did not
correct the problems in the first one causing the court rejection. In addition, the Receiver has in
recent weeks taken the position that she will not submit to me the new version unless I accept a
confidentiality agreement that she has not proposed to me, and has not responded to my
proposal.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

3 Executed this 24th day of October, 2016 at Berkeley, California.

4 

5 _____
6 Warren Havens
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

EXHIBIT 1

ENDORSED
FILED
ALAMEDA COUNTY

OCT 14 2016

By SUE PESKO

Andrew B. Downs, SBN 111435
C. Todd Norris, SBN 181337
Norman J. Ronneberg, Jr., SBN 68233
BULLIVANT HOUSER BAILEY PC
235 Pine Street, Suite 1500
San Francisco, California 94104-2752
Telephone: 415.352.2700
Facsimile: 415.352.2701
E-Mail: andy.downs@bullivant.com
todd.norris@bullivant.com
norman.ronneberg@bullivant.com

Attorneys for Defendant
WARREN HAVENS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ARNOLD LEONG,

Plaintiff,

v.

WARREN HAVENS, et al.

Defendants.

Case No.: 2002-070640

**OPPOSITION TO MOTION OF
RECEIVER FOR AN ORDER
APPROVING SALE OF WIRELESS
SPECTRUM ASSETS TO PTC-220 LLC**

DATE: October 27, 2016

TIME: 3:45 p.m.

DEPT.: 24 (Hon. Frank Roesch)

RESERVATION NO. R-1786429

**I. THE PROPOSED DEAL IS PROHIBITED BY THE BANKRUPTCY CODE'S
AUTOMATIC STAY¹**

The Receiver's proposed sale of spectrum to PTC-220 LLC (and other substantive actions with the Receivership Entities and their assets, other than custodial duties of

¹ This filing is subject to approval or other action that may be imposed by the bankruptcy court to protect the estate of the alleged Debtor "Leong Partnership." Havens will file with this court a copy of his motion being filed with the bankruptcy court, which includes additional substantive objections to this motion. The bankruptcy court has jurisdiction over the receivership entities and their assets including their FCC licenses, and the automatic stay applies to same, as explained herein and elsewhere in the record for this action.

1 preservation under bankruptcy law) is prohibited by and sanctionable under the automatic stay
2 under 11 U.S.C. §362 in effect in the bankruptcy pending before the United States Bankruptcy
3 Court for the Northern District of California, entitled *In re: Leong Partnership*, U.S.B.C. N.D.
4 Cal. Case No. 16-42363. 11 U.S.C. § 362. The Leong Partnership involuntary bankruptcy
5 petition was filed on August 22, 2016. The petition is attached as Exhibit 1 to defendant
6 Haven's Notice of Certain Filings And Proceedings Before the United States Bankruptcy Court
7 For The Northern District of California (filed herein on September 26, 2016). The Leong
8 Partnership is described beginning at paragraph 6 of Attachment #2 to the involuntary
9 bankruptcy petition.² Among other things, the assets of the partnership are alleged to include
10 the Receivership entities in this case, including their FCC licenses. (*Id.* at para. 9). Defendant
11 Havens reserves all rights with respect to the Receiver's continuing violations of the automatic
12 stay.

13 Defendant Havens is a Petitioning Creditor in the Leong Partnership bankruptcy and is
14 in the process of filing a motion seeking affirmative relief regarding the application of the
15 Automatic Stay to the Receivership Entities in this case and their FCC licenses and other assets,
16 which Petitioning Creditor Havens alleges to be property of the estate. The automatic stay, by
17 its very definition, and controlling case law, as well as indisputable "black letter" bankruptcy
18 law, places the burden on the Receiver to seek relief from the stay in order to control, sell or
19 otherwise act with respect to the assets in question. Petitioning Creditors will seek an order
20 from the bankruptcy court explicitly prohibiting the Receiver from further violations of the
21 automatic stay, as well as remedies for preceding violations.

22
23 ² Also see paragraphs 13-15 that explain that Mr. Leong's alleged oral partnership with Havens
24 is also part of the Leong Partnership that is the same oral partnership that Mr. Leong alleged in
25 his 2002 court complaint and that he maintains to this day including in his 2015 court filings to
26 get a receivership over all the receivership entities. Leong claims that his alleged oral
27 partnership is the real controller and owner entity of all assets, and that the LLCs were only
28 temporary. The position of the petitioning creditors, including Havens, in the bankruptcy case is
that this constitutes partnership by estoppel for purposes of the bankruptcy, in accord with
bankruptcy case precedent and state law defining and establishing partnership by estoppel. In
fact, Maritime Communications/Land Mobile LLC has requested that the FCC investigate Mr.
Leong's alleged oral partnership claims because it would violate FCC rules and be grounds for
disqualification of Leong and Havens and revocation of the receivership entities' licenses.

1 Attached hereto as Exhibit A are relevant highlighted sections of Collier on Bankruptcy.

2 **II. CONCLUSION**

3 For all of the foregoing reasons, the Receiver's motion should be denied.

4
5 DATED: October 14, 2016

6 BULLIVANT HOUSER BAILEY PC

7
8 By 

9 Andrew B. Downs

C. Todd Norris

Norman J. Ronneberg, Jr.

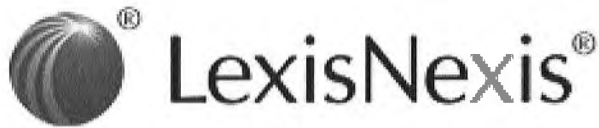
10 Attorneys for Defendant Warren Havens

11 4815-2530-5147.1

EXHIBIT A

EXHIBIT A

[Underlining added]



FOCUS - 3 of 3 DOCUMENTS

Collier on Bankruptcy, Sixteenth Edition

Copyright 2016, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

App. Pt. 44 National Bankruptcy Review Commission Final Report
BANKRUPTCY--THE NEXT TWENTY YEARS
BANKRUPTCY: THE NEXT TWENTY YEARS (October 20, 1997) *
Volume I
Chapter 2: Business Bankruptcy
Discussion

G-44 Collier on Bankruptcy 2.3.1

§ 2.3.1 Defining the term "General Partner"

A "general partner" should be defined under 11 U.S.C. § 101 as any entity that as a result of an existing or former status as an actual or purported general partner in an existing, former, predecessor, or affiliated partnership, is liable under applicable nonbankruptcy law for one or more debts of the partnership.

Rationale. Although the Bankruptcy Code declares that a partnership is a "person" n911 and as such is eligible for relief, n912 nowhere is the term "general partner" defined despite the Code's repeated reference to a "general partner". n913 Indeed, the Bankruptcy Code, among other things, specifically authorizes an involuntary case to be commenced against a partnership by less than all of the general partners. n914 The law is simply unclear as to whether the Code's provisions aimed at addressing the liabilities and claims by or against a general partner are applicable in specific contexts. n915 The Commission's Recommendations for the treatment of debtor partnerships provide a comprehensive framework to establish the rights and liabilities in bankruptcy of these often complicated relationships. n916 A necessary step to achieving this clarification is a definition of those persons to whom these provisions apply. The Recommendation is aimed at providing clarity and certainty by defining "general partner."

The term "general partner" under the Recommendation would include any entity that is liable for the debts of the partnership by virtue of applicable nonbankruptcy law. Whether an entity was a general partner at the time of the partnership's bankruptcy filing is not material. As long as an entity has general partner liability for a prepetition debt, that entity qualifies as a general partner under the Recommendation. Because the definition is a status-based definition, the term does not include an entity that may be liable solely by virtue of guaranteeing a partnership obligation. Partnership guarantors are not generally considered "partners" under state law and the Recommendation is consistent with that state law result. Included within the definition of the term "general partner," however, is any entity liable as a general partner by estoppel, n917 as an implied general partner or otherwise under nonbankruptcy law. A limited partner, as a consequence of exercising management control or by virtue of estoppel, is also included in the definition if

liability for partnership debts would attach under nonbankruptcy law. n918

Designation under the Recommendation as a "general partner" does not alter the general partner personal liability rules under nonbankruptcy law. n919 As a result, a person that is admitted as a general partner in an existing partnership generally would not, under nonbankruptcy law, be personally liable for partnership obligations incurred prior to admission. n920 Similarly, the personal liability of a former partner for the obligations of the partnership or any deficiency arising after withdrawal is generally limited. n921

Competing Considerations. It may be argued that the Bankruptcy Code should *not* provide a specific definition of a "general partner" because the determination of who is liable as a general partner is governed by nonbankruptcy law. n922 Moreover, the authorities appear to be generally in accord with respect to such a determination. n923 There may be a risk that a Bankruptcy Code definition could create problems and uncertainty and that any definition of partner should, accordingly, be left up to state law.

Return to Text

FOOTNOTES:

(n4664)Footnote 911. *11 U.S.C. § 101(41)(1994). Contra In re C- TC 9th Avenue Partnership v. Norton Co.*, 113 F.3d 1304 (2d Cir. 1997) (ruling that a partnership in dissolution is not a "person" eligible for relief under Chapter 11 of the Bankruptcy Code).

(n4665)Footnote 912. *11 U.S.C. §§ 109, 303(1994).*

(n4666)Footnote 913. *See, e.g., Id. §§ 303(b)(3), (d), 723.*

(n4667)Footnote 914. *Id. § 303(b)(3).*

(n4668)Footnote 915. *See Marshack v. Mesa Valley Farms, L.P. (In re Ridge II)*, 158 B.R. 1016, 1023-24 (Bankr. C.D. Cal. 1993) , *aff'd in part*, 1996 WL 285445 (9th Cir. 1996) (finding that it is unclear whether a limited partner that would be ineligible for limited liability under applicable nonbankruptcy law should be treated as a general partner under section 723(a)).

(n4669)Footnote 916. The Ad Hoc Committee on Partnerships in Bankruptcy of the Business Section of the American Bar Association was created in 1991 and Morris W. Macey and Professor Frank R. Kennedy served as the chairman and the reporter, respectively. Morris W. Macey & Frank R. Kennedy, *Partnership Bankruptcy and Reorganization: Proposals for Reform*, 50 *Bus. Law.* 879 (1995) (setting forth the Ad Hoc Committee's Proposals on partnership bankruptcy) [hereinafter, the *ABA Ad Hoc Committee Report*]. The Ad Hoc Committee proposed this definition of a general partner in section 101(26A) of its report.

The National Bankruptcy Conference ("NBC") began reviewing partnership bankruptcy issues as part of its comprehensive review of bankruptcy law. On May 1, 1997, the NBC issued its Final Report, Revised Edition, which contains proposed reforms to the Bankruptcy Code on debtor partnerships as well as debtor partners. This definition of "general partner" was also proposed by the NBC. Reforming the Bankruptcy Code: National Bankruptcy Conference's Code Review Project, Final report, 207-08 (rev. ed. 1997) [hereinafter *NBC Final Report*].

(n4670)Footnote 917. *See U.P.A. §§ 7, 16(1992) (partnership by estoppel*; imposing partnership liability where such a relation in fact may not exist since equitable principles dictate that an apparent partner should be estopped from denying the existence of the relation).

(n4671)Footnote 918. *See U.L.P.A. § 303 (1996) (imposing general liability upon a limited partner if the limited partner participates in the general control of the business). See, e.g., Hoffman v. Ramirez (In re Astroline*

Communications Co. Ltd. Partnership, 161 B.R. 874, 879 (Bankr. D. Conn. 1993) (indicating that limited partners who would be liable to partnership creditors under state law can be pursued by a partnership trustee under section 544 or section 723(a)).

(n4672)Footnote 919. *See infra*, Recommendation 2.3.4 (limiting the liability of a general partner for any deficiency in the assets of the partnership "to the extent that, under nonbankruptcy law, such general partner is personally liable for such deficiency").

(n4673)Footnote 920. *See* U.P.A. §§ 17, 41(1992) (delineating the liability of an incoming partner).

(n4674)Footnote 921. *See id.* § 36.

(n4675)Footnote 922. *See, e.g.*, R.U.P.A. § 308(1996) (defining the liability of a purported partner) and U.P.A. § 16(1992).

(n4676)Footnote 923. *See generally In re Invig*, 118 B.R. 993 (Bankr. N.D. Iowa 1990) .

[Underlining added.]



FOCUS - 6 of 15 DOCUMENTS

Collier on Bankruptcy, Sixteenth Edition

Copyright 2016, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

Chapter 3 BANKRUPTCY CODE, Case Administration

Subchapter IV Administrative Powers

Chapter 362 Automatic Stay

3-362 Collier on Bankruptcy P 362.02

P 362.02 Effective Time of Stay and Notice

The stay is effective automatically and immediately upon the filing of a bankruptcy petition, whether voluntary, joint or involuntary. n1 Formal service of process is not required, and no particular notice need be given in order to subject a party to the stay. n2 In certain limited situations involving repeat bankruptcy filings, the stay does not arise automatically. n3 At least one court has held that, in unusual cases involving abuse of the bankruptcy court's jurisdiction, the stay might not apply. n4 But a creditor acting in reliance on such an exception does so at its peril. n5

In general, actions taken in violation of the stay will be void, or at least voidable, even where there was no actual notice of the existence of the stay. n6 Violation of the stay is punishable as contempt of court. n6a Particularly if the violation is willful, the court may punish the violator for contempt and take other appropriate steps to negate the impact of the improper action. In addition, if the debtor is an individual who has been injured by a willful violation of the stay, a court may award damages under section 362(k). n7 A party that has received notice of the bankruptcy case, even if only oral notice, can be sanctioned for violation of the stay. n8 If there are doubts about the veracity of the notice, it is incumbent upon the party receiving notice to determine for itself, before acting, whether a case has been filed. n9

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysDurationBankruptcy LawCase AdministrationNoticeCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

[Return to Text](#)

FOOTNOTES:

(n1)Footnote 1. The stay does not arise automatically in a chapter 15 case commenced by the filing of a petition for

recognition of a foreign proceeding under 11 U.S.C. § 1503, although section 1519 authorizes the court to issue a broad stay. See ch. 1519 *infra*. In addition, conversion of a case from one chapter to another does not trigger a new automatic stay. E.g., *In re State Airlines, Inc.*, 873 F.2d 264 (11th Cir. 1989) .

(n2)Footnote 2. See *Job v. Calder (In re Calder)*, 907 F.2d 953 (10th Cir. 1990) ; *Smith v. First Am. Bank, N.A. (In re Smith)*, 876 F.2d 524 (6th Cir. 1989) ; cf. *Mueller v. Nugent*, 184 U.S. 1, 22 S. Ct. 269, 46 L. Ed. 405 (1901) ; *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976) , *cert. denied*, 429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540 (1977) .

(n3)Footnote 3. For example, in a case filed by an individual debtor who has had two prior cases that were pending and dismissed within the previous year, the stay is not automatically effective and will take effect only upon order of the court. See 11 U.S.C. § 362(c)(4); P 362.06[4] *infra* .

(n4)Footnote 4. *FDIC v. Cortez*, 96 F.3d 50 (2d Cir. 1996) (debtor colluded in filing of involuntary petition after court had prohibited a voluntary petition for 12 months).

(n5)Footnote 5. See *In re Carter*, 16 B.R. 481 (W.D.Mo. 1981) , *aff'd*, 691 F.2d 390, 7 C.B.C.2d 683 (8th Cir. 1982) .

(n6)Footnote 6. Courts have disagreed about whether actions taken in violation of the stay are void or voidable. Compare *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997) (void), and *In re Schwartz*, 954 F.2d 569, 26 C.B.C.2d 649 (9th Cir. 1992) (void), with *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 28 C.B.C.2d 1002 (6th Cir. 1993) (voidable). This issue is discussed at P 362.12[1] *infra*. Where, however, the liability of the third party arises only upon nonpayment by the debtor and the automatic stay prohibits the debtor from paying, the third party may be relieved of liability for the debtor's nonpayment. *Belcufine v. Aloe*, 112 F.3d 633, 37 C.B.C.2d 1521 (3d Cir. 1997) (corporate managers did not pay corporate debtor's obligations to employees, for which Pennsylvania law made the managers liable in the event of corporate nonpayment).

(n7)Footnote 6a. See P 362.12[2] *infra*.

(n8)Footnote 7. 11 U.S.C. § 362(k), formerly § 362(h), as amended and redesignated by Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005. See P 362.12 *infra*.

(n9)Footnote 8. A monetary penalty may not be imposed on a creditor for violation of the stay if the conduct that is the basis for the violation occurs before the creditor has received effective notice under section 342 of the order for relief. 11 U.S.C. § 342(g)(2); see P 362.12[3] *infra*.

(n10)Footnote 9. *In re Carter*, 16 B.R. 481 (W.D.Mo. 1981) , *aff'd*, 691 F.2d 390, 7 C.B.C.2d 683 (8th Cir. 1982)

[Underlining added]



FOCUS - 4 of 11 DOCUMENTS

Collier on Bankruptcy, Sixteenth Edition

Copyright 2016, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

Chapter 3 BANKRUPTCY CODE, Case Administration
Subchapter IV Administrative Powers
Chapter 362 Automatic Stay

3-362 Collier on Bankruptcy P 362.03

P 362.03 Scope of Stay: § 362(a)

The stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), n1 applies to almost any type of formal or informal action taken against the debtor or the property of the estate. n2 The stay applies to all entities. Under section 101, "entity" is broader than "person" and includes, in addition to a person, an "estate, trust, governmental unit, and the United States trustee." n3 Although the stay protects the debtor against a broad range of actions and activities, it does not protect separate legal entities, such as corporate directors, officers or affiliates, partners in debtor partnerships or codefendants in pending litigation. n4 These entities may, however, obtain protection through a section 105 injunction if relief is appropriate. n5

The stay provides the debtor with relief from the pressure and harassment of creditors seeking to collect their claims. It protects property that may be necessary for the debtor's fresh start and, in terms of a debtor in a chapter 11, 12 or 13 case, provides breathing space to permit the debtor to focus on rehabilitation or reorganization. In addition, the stay provides creditors with protection by preventing the dismemberment of a debtor's assets by individual creditors levying on the property. This promotes the bankruptcy goal of equality of distribution. n6

The section 362 stay becomes operative when a petition is filed under section 301, 302 or 303, or when an application is filed under section 5(a)(3) of the Securities Investor Protection Act of 1970. Subsection 362(a) provides for an automatic stay, applicable to all entities, of a wide variety of actions listed in subsections (a)(1) through (a)(8). While the language is from time to time duplicative, little is omitted. Thus, virtually all acts to collect prepetition claims and all actions that would affect property of the estate are stayed. However, it should be noted that some actions, although stayed under section 362(a), may be permitted under the exceptions listed in section 362(b).

[1] Liquidation Cases

The stay is of considerable importance in liquidation cases. It provides immediate relief for debtors in financial difficulty and protects the trustee's ability to control the liquidation of property of the estate. The protection afforded by the automatic stay generally applies throughout the pendency of the case. n6a For individual debtors the stay is replaced by a permanent injunction upon entry of the discharge, preventing collection of prepetition dischargeable debts as a

personal liability of the debtor after the closing of the bankruptcy case. n6b The stay also protects individual debtors' exemption rights, and their ability to avoid liens on exempt property and redeem exempt personal property, by preventing creditors from seizing or selling the property at issue.

[2] Reorganization Cases

In reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. Secured creditors and judgment creditors might race to seize and sell the debtor's assets in order to obtain satisfaction of their claims, without regard to the interests of other creditors or the value of keeping assets together in an operating business. The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business. The stay also protects property of the estate after confirmation of the plan while the reorganization case is pending, unless the property has vested back in the debtor postconfirmation in a chapter 12 or chapter 13 case.

[3] Legal Proceedings: § 362(a)(1)

Subsection (a)(1) provides for a broad stay of legal proceedings against the debtor that were or could have been commenced prior to the commencement of the bankruptcy case, or that seek to recover a prepetition claim against the debtor. n7 It includes a stay against the commencement or continuation of administrative, judicial and other actions or proceedings against the debtor, n8 such as interception of tax refunds for payment of debts n9 or revocation of a license due to failure to pay a debt. n10 The stay includes actions seeking injunctive or similar relief as well as actions seeking money judgments. It stays appeals in actions against the debtor as well as initial lawsuits. n11

The stay provision of subsection (a)(1) is drafted so broadly that it encompasses all types of legal proceedings, subject only to the exceptions provided in section 362(b). It even covers actions or proceedings against the debtor when the debtor acts solely in a fiduciary capacity. n12 Except as provided in section 362(b), the stay prohibits proceedings on both dischargeable and nondischargeable debts. n13

When litigation is pending against the debtor at the time a bankruptcy case is commenced, the litigation is stayed automatically. The nondebtor party has an obligation to notify the court in which the litigation is pending that the action is stayed and to take any other action necessary to assure that the action does not continue. Failure to do so violates the stay. n14 In addition, if the nonbankruptcy court continues the action or enters a judgment notwithstanding the imposition of the automatic stay, the action or judgment should be considered ineffective against the debtor. n15 Some courts permit a mortgage creditor to continue a scheduled foreclosure sale, often by re-advertising a new sale date, pending a determination by the creditor as to whether relief from the automatic stay will be sought. n16 The reasoning of these decisions is that postponement of a previously scheduled sale is consistent with the purpose of the automatic stay in maintaining the status quo. However, subsection (a)(1) expressly prohibits the "continuation" of actions, which should include the rescheduling of a sale. To avoid potential abuse of the practice, some courts have required that sale postponements be in accordance with state law procedure and limited in number so as to provide time for the creditor to promptly seek stay relief. n17

Litigation in which the debtor is not a party and that only collaterally affects the debtor is not stayed. For example, discovery against the debtor in an action against defendants other than the debtor is not stayed. n18

[a] Actions Commenced, or Claims Arising, Prior to Commencement of Case

The stay of litigation is limited to actions which could have been commenced before the commencement of the case or which are based upon claims that arose before commencement of the case. A claim arises at the time an obligation is incurred, not when it is due. Because section 101 includes contingent, unliquidated and unmatured rights to payment

within the definition of claim, the stay prevents enforcement of such claims even if they become fixed after the commencement of the case. Claims which are contingent or unliquidated before the commencement of the case nevertheless "arise" before the commencement of the case. Thus, cases that have held that the stay might not apply to the enforcement of a claim that was contingent as of the commencement of the case and became fixed thereafter n19 should not be followed. n20

[b] Issuance of Process in Any Proceeding

The stay includes a prohibition against the issuance or employment of process. This recognizes that in some cases mere issuance or service of process, without further pursuit of litigation, may be sufficient to induce action on the part of a debtor. Particularly in individual bankruptcy cases, this might enable a creditor to obtain payment or property to which it would not otherwise be entitled. The legislative history makes it clear that more informal types of proceedings, such as arbitration and license revocation proceedings, are also within the scope of the stay of section 362(a)(1). n21

[c] Actions on Postpetition Claims Not Stayed

Actions on claims that arise after the commencement of the case are not stayed. n22 Such a stay would discourage others from dealing with the trustee or debtor in possession. However, enforcement of a judgment on a postpetition claim is typically stayed. n23 Subsections 362(a)(4) and (a)(5) stay any act against property of the estate. Similarly, subsections (a)(5) and (a)(6) stay any act to enforce prepetition claims against the debtor or its property. Consequently, a postpetition claim against the estate may not be enforced against property of the estate, but a postpetition claim against a debtor may be enforced against property that is not property of the estate. Because all of a corporate or partnership debtor's property, whether acquired before or after commencement of a case, is property of the estate, even a postpetition claim will not be enforceable against such a debtor's property. Similarly, in a chapter 12 or chapter 13 case, property acquired by the debtor after commencement of the case is property of the estate, at least until the confirmation of a plan. n24

[d] Actions Against Nondebtors Not Stayed

The stay of litigation does not protect nondebtor parties who may be subjected to litigation for transactions or events involving the debtor. n25 Thus, for example, a suit against a codefendant is not automatically stayed by the debtor's bankruptcy filing. n26 Similarly, an action may be brought against general partners of a partnership when the partnership, but not the partners, is in bankruptcy, n27 or against corporate shareholders. n28 An action also may be brought against guarantors free of the automatic stay. n29 However, an action against a debtor's insurers may be stayed. Some courts have held that a debtor's insurance policies are property of the estate and that, therefore, an action to recover on those policies is stayed. n30

Although an action against third parties such as guarantors or codefendants is not stayed under section 362(a), a court retains the power to enjoin the action if continuation of the action would interfere substantially with the debtor's reorganization. n31 Moreover, an action against a third party may be stayed when the debtor is a necessary party and the real party in interest. For example, an action against a corporation with no remaining assets to establish a mortgage deficiency may be stayed when the debtor is a guarantor of the mortgage and will ultimately be liable for the deficiency established in the action. n32

[e] Ministerial Acts Not Stayed

Purely ministerial acts are not subject to the automatic stay. n33 Courts have sought to distinguish acts that represent the continuation of litigation against the debtor from purely ministerial acts that may not be subject to the automatic stay. n33a Given the importance of the automatic stay, the concept of purely ministerial acts should be narrowly construed to protect only those acts that are clerical in nature and do not involve the exercise of any discretion or judgment. n34 Thus, entry by the clerk of a judgment previously ordered by the court may be a purely ministerial act which may be

taken without violating the stay, n35 while the court's ordering entry of a judgment involves a judicial function that goes beyond a merely ministerial act n36 and, thus, would be subject to the stay. Even the entry of a judgment on the judgment docket may be stayed to the extent that such entry creates a judgment lien on property of the estate. n37

[4] Enforcement of Judgments; § 362(a)(2)

Section 362(a)(2) stays the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case. n38 Also stayed are levy and execution, pursuant to a prepetition judgment, against the property of the estate and against property of the debtor. This stay protects exempt assets that cease to be property of the estate and assets acquired after the commencement of a case.

In addition, proceedings supplementary to judgment, such as a debtor's examination or the like, are stayed. n38a Similarly, levy of execution, restraining orders, civil arrest orders and exercise of any other postjudgment remedies are stayed.

The stay is not limited by the concept of *custodia legis*; it applies to property of the estate in the custody of third parties including that seized in enforcement of a judgment. n39 Thus, garnishment of debts owed or property held by a third party is also stayed. n40

Staying enforcement against the debtor gives the debtor breathing space, free of creditor harassment. Staying enforcement against property of the estate protects the property against piecemeal liquidation and also assures that the trustee or debtor in possession can distribute the property of the estate in an equitable manner or use the property in a reorganization effort. In this regard, "property of the estate" is expansively defined to include all legal and equitable interests of the debtor in property as of the commencement of the case. n41

[5] Acts to Obtain Possession of Property of the Estate or Property from the Estate; § 362(a)(3)

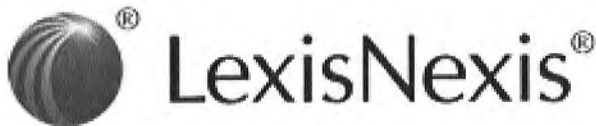
Section 362(a)(3) stays all actions, whether judicial or private, that seek to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. The trustee or debtor in possession takes control of all property of the estate in order to maintain any going concern value and to assure an equitable distribution of the property among creditors. This requires that no entity seek to interfere with these tasks by taking possession of or exercising control over property of the estate. It also requires that no entity grab non-estate property *from* the estate without the court supervision that comes from a stay relief proceeding.

This provision should be read with sections 542 n42 and 543, n43 which assist the trustee in obtaining possession of property of the estate that is in the possession of third parties, by requiring turnover of the property to the trustee. The failure of an entity in possession of estate property to turn over the property to the trustee would be a violation of section 362(a)(3) except as may otherwise be provided in section 542. n44 And the Third Circuit has ruled that a franchisor's actions, both outside the bankruptcy court and in the bankruptcy case itself, to obtain possession of a debtor's franchise prepetition might violate the automatic stay. n45 The better view, however, is that proper objections in the bankruptcy court do not violate the stay.

The property protected may be property of the estate or property in the possession of the estate. An example of the latter would be property which was leased or bailed to the debtor prior to the commencement of the case. n46 If, however, the property in question is not property of the estate and was not in possession of the debtor at the time of the commencement of the case, section 362(a)(3) is inapplicable. n47

The stay applies to attempts to obtain or exercise control over both tangible and intangible property. n48 It may even apply to a town ordinance that attempts to revoke a debtor's estoppel right to have a zoning application processed. n49 It also protects fraudulent transfer and other causes of action that are vested in the trustee. n50 However, some courts have

[Underlining added.]



FOCUS - 8 of 15 DOCUMENTS

Collier on Bankruptcy, Sixteenth Edition

Copyright 2016, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

Chapter 3 BANKRUPTCY CODE, Case Administration

Subchapter IV Administrative Powers

Chapter 362 Automatic Stay

3-362 Collier on Bankruptcy P 362.12

P 362.12 Remedies for Violation of the Stay

The automatic stay of section 362 is effective immediately upon the filing of the petition, whether voluntary, joint or involuntary. Formal service of process is not required. Because the stay is imposed automatically, and often without notice to parties who may be stayed, a party may violate the stay without realizing that it has taken effect. In other cases, a party may knowingly violate the stay, either in the erroneous belief that the party's action is permitted or in disregard of the stay. At least one court has held that only a party protected by the stay may seek enforcement of the stay. n1

[1] Action Violating Stay Is Void

Most courts have held that actions taken in violation of the stay are void and without effect. n2 However, some courts have found that actions taken in violation of the stay are voidable, not void, permitting an action to take effect if it is not objected to. n3 The cases draw support for this proposition from the fact that one of the alternatives under section 362(d), when a request for relief from the stay is made, is to annul the stay and thus apparently to validate actions otherwise taken in violation of it. n4

The better approach is to view the annulment option as a means of avoiding the effect of the stay, rather than as an indication that acts taken in violation are voidable. If such acts were merely voidable, then the debtor would have the obligation to avoid acts taken in violation. n5 In view of the importance of the stay, it is preferable to treat any such acts as void and of no effect, subject to being given effect by annulment or modification of the stay. n6

Although a court may use the annulment power to give retroactive relief from the stay, relief should be granted sparingly. n7 The breathing room provided by the stay would be limited if debtors feared regular retroactive validation. Debtors would be forced to defend all actions, even those stayed, because the stay might be retroactively annulled and a default by the debtor might become binding. Thus, retroactive relief should be granted only in extraordinary circumstances, such as when a creditor acted without knowledge of the stay, under circumstances in which relief from the stay would have been available, and where the creditor changed its position in reliance on the validity of its action.

[2] Violation of Stay Is Contempt of Court

A violation of the stay is punishable as contempt of court. n8 Most courts will impose contempt sanctions for a knowing and willful violation of a court order, and the automatic stay is considered as equivalent to a court order. n9 If the conduct is willful, even if based upon advice of counsel, contempt is an appropriate remedy. n10 When a violation of the stay is inadvertent, contempt is not an appropriate remedy. n11 Nevertheless, the creditor has a duty to undo actions taken in violation of the automatic stay. n12 Failure to undo a technical violation may elevate the violation to a willful one. n13

In *In re Crysen/Montenay Energy Co.*, n14 the court described the standard governing the imposition of sanctions in contempt proceedings as follows:

[Prior to the enactment of section 362(k)] the standard that governed the imposition of sanctions was that which governed contempt proceedings: a party generally would not have sanctions imposed for its violation of an automatic stay as long as it had acted without maliciousness and had a good faith argument and belief that its actions did not violate the stay.

It should be noted that there had been some uncertainty about whether contempt and other remedies were available against states that violate the automatic stay. In *Seminole Tribe of Florida v. Florida*, n15 the Supreme Court held that in the absence of a state's waiver of sovereign immunity, Congress may abrogate a state's sovereign immunity only through an unequivocal expression of intent to abrogate in legislation enacted pursuant to a valid exercise of power. Although the 1994 amendments added an express waiver of sovereign immunity in *Code section 106*, there remained concerns that this waiver was an invalid and unconstitutional exercise of congressional power. n16 The Supreme Court subsequently held, in *Central Virginia Community College v. Katz*, n16a that abrogation of sovereign immunity in most bankruptcy proceedings is not required to determine if states are subject to suit. The Court concluded that the states surrendered their immunity when they agreed to the Bankruptcy Clause of the Constitution and thus bankruptcy proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy court may be brought against the states. Proceedings to enforce the automatic stay therefore should be permitted to be brought against state governments. n16b

[a] Procedure for Dealing with Contempt

Federal Rule of Bankruptcy Procedure 9020 formerly set out a detailed procedure for dealing with contempt. n17 The procedure was abrogated by the 2001 amendments to the rule, and the rule now simply provides for application of *Rule 9014* to motions for contempt. *Rule 9020* does not address contempt proceedings initiated by the court *sua sponte*.

[b] Effect of Bad Faith Commencement of Bankruptcy Case

In some cases, courts have been persuaded to annul the automatic stay when the filing of the case was in bad faith. In this event, an innocent action in apparent violation of the stay will not be void. n18 In all but the rarest case, it will be prudent for the creditor to undo the effect of its innocent action and thereafter to assert the debtor's bad faith as a basis for relief. n19

[3] Recovery of Damages for Willful Violation of the Stay; § 362(k)

Section 362(k)(1), which was designated as section 362(h) prior to the 2005 amendments, provides for a recovery of damages, costs and attorney's fees by an individual damaged by a willful violation of the stay. n20 In an appropriate case, an individual injured by a stay violation may also recover punitive damages. n21 There also appears to be an "emerging consensus" that emotional distress damages may be recovered in an award of actual damages under section 362(k)(1). n22 Once the creditor becomes aware of the filing of the bankruptcy petition and therefore the automatic stay, any intentional act that results in a violation the stay is "willful." No specific intent to violate the stay or malice is required. n23 The bankruptcy court has exclusive jurisdiction over sanctions for a stay violation. n24

Several amendments to the Bankruptcy Code made in 2005 limit the relief available under section 362(k)(1). Section 362(k)(2) was added as a companion provision to section 362(h), which provides for the termination of the stay as to personal property based on the debtor's failure to take certain action related to the statement on intention under section 521(a)(2).ⁿ²⁵ If a violation of the stay is based on an action taken by an entity in the good faith belief that the stay had been terminated as to the debtor under section 362(h), section 362(k)(2) provides that the recovery under section 362(k)(1) shall be limited to actual damages. Recovery of actual damages, based on the language of section 362(k)(1), may include an award of attorney's fees and costs.

In *Sternberg v. Johnston*,ⁿ²⁶ the Court of Appeals for the Ninth Circuit held that a debtor may recover attorney's fees under section 362(k)(1) to the extent that they are an element of the debtor's actual damages. Applying this narrow construction of the statutory language providing for recovery of "actual damages, including costs and attorneys' fees," the *Sternberg* court held that attorney's fees may be recovered only for work involved in bringing about an end to the stay violation and not for pursuing an award of damages. The court said that "actual damages" was an ambiguous phrase and that more explicit statutory language was required to deviate from the American Rule in which parties bear their own attorney's fees, at least with respect to fees related to the recovery of damages.ⁿ²⁷

It is hard to conceive that Congress intended such a distinction for stay enforcement actions in light of the remedial purpose of fee shifting provisions. Attorneys' fees incurred in prosecuting an action to obtain full relief under the statute, including any entitlement to actual and punitive damages, is as much a part of the debtor's "actual damages" as those incurred in stopping the stay violation. Any variation in the statutory language between section 362(k)(1) and other fee shifting provisions, such as those contained in civil rights and consumer protection statutes, should not signal an intent by Congress to limit the purpose of these statutes to encourage attorneys to bring enforcement actions and to "promote citizen enforcement of important federal policies."ⁿ²⁸ This "private attorney general" purpose of section 362(k)(1) is undermined if debtors in bankruptcy, having significant constraints on their ability to pay for legal representation, are not able to recover attorneys' fees for their entire representation in a stay enforcement proceeding. Perhaps in recognition that its ruling would have this effect, the *Sternberg* court noted that its decision was limited to the application of section 362(k) and did not preclude a debtor from seeking attorney fees in a civil contempt enforcement proceeding or under the bankruptcy court's inherent civil contempt authority.ⁿ²⁹

No other circuit courts have adopted the *Sternberg* interpretation of section 362(k)(1). In contrast with *Sternberg*, the Court of Appeals for the Fifth Circuit rejected an argument that "the statute does not provide for a successful claimant to collect the fees incurred in prosecuting their action."ⁿ³⁰ The court also found that the prevailing party in a section 362(k)(1) proceeding did not need to "prove that fees actually have been paid before they can be awarded."ⁿ³¹ Even the Court of Appeals for the Ninth Circuit has concluded that its decision in *Sternberg* was flawed. Rather than decide whether *Sternberg*'s holding applied to the facts of a subsequent case, the Ninth Circuit sitting *en banc* decided that "the better course is to jettison *Sternberg*'s erroneous interpretation of § 362(k) altogether."^{n31a}

Section 342(g)(2) provides that a "monetary penalty" may not be imposed on a creditor under section 362(k) for violation of the stay unless the conduct that is the basis for the violation occurs after the creditor has received effective notice as provided under section 342 of the order for relief. Since actual damages are typically viewed as compensatory in nature, and generally do not serve as a penalty, this provision appears to preclude only the recovery of punitive damages under section 362(k)(1). This limitation on the award of punitive damages applies only to the creditor who has not received effective notice under section 342, not others who have violated the stay.^{n31b}

Several courts have considered whether section 362(k) provides all debtors with a remedy against stay violators or whether its scope is limited by the reference in section 362(k) to an "individual" injured by a stay violation. The question is of some importance because, although a stay violation may be punished as contempt, the imposition of a remedy under a civil contempt procedure may be subject to a stricter standard than is imposed by section 362(k) and does not afford the availability of punitive, in addition to compensatory, damages.

Some courts have held that the section 362(k) remedy is available only to natural persons. n32 For example, in *In re Chateaugay Corp.*, n33 the Court of Appeals for the Second Circuit held that the remedy under section 362(k) is not available to corporate debtors and instead is limited to debtors who are natural persons. The court suggested that the context in which the term "individual" is used generally suggests a natural person, not a partnership or a corporation. For example, only an "individual" with regular income may file a chapter 13 petition. Apparently, Congress intended that only natural persons could use chapter 13 and that partnerships and corporations must generally reorganize under chapter 11. The court also pointed to section 101, which defines "relative" as an "individual related by affinity or consanguinity within the third degree." The court dryly observed that corporations and partnerships are not related by affinity or consanguinity; thus, "individual" must be limited to a natural person. The court also found that there was no legislative history to suggest that the term "individual" was intended to refer to a "person." Thus, there was no reason to believe that rejection of the broader interpretation would defeat the legislative intent.

Other courts have permitted corporate debtors to take advantage of section 362(k). The leading case in this respect is *Budget Service Co. v. Better Homes of Virginia, Inc.* n34 The court stated that "it seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section." n35 Thus, the court held that the term "individual" as used in section 362(k) includes corporate debtors and that the provision gave the bankruptcy court the authority to impose the sanctions.

There is also a split of authority over whether a bankruptcy trustee is an individual for purposes of section 362(k). In *In re Pace*, n36 the Court of Appeals for the Ninth Circuit read "individual" narrowly to exclude a trustee because, while the trustee was a natural person, the interest the trustee represented was that of the bankruptcy estate, not a natural person. In *In re Garofalo's Finer Foods, Inc.*, the district court rejected the Ninth Circuit's narrow reading of the term "individual" in favor of a broader definition that would assure that the estate, through the trustee, could recover costs and attorney's fees incurred by the trustee in, among other things, recovering property in the possession of a recalcitrant third party. n37

Although the automatic stay is of critical importance in bankruptcy cases, the better approach is to recognize that section 362(k) provides a remedy only for natural persons. The provision was enacted in 1984 as part of a package of consumer amendments intended to deal with individual bankruptcy. n38 If Congress had intended to provide a damage remedy for all debtors, it could easily have chosen a word other than "individual" to denominate the beneficiaries of the remedy. In fact, although the standards and procedures for contempt may be slightly more demanding, courts have had little difficulty dealing with and punishing stay violations even without the availability of section 362(k). n39 There is little reason to adopt a tortured reading of the statute in order to provide corporate or partnership debtors or trustees with a remedy for stay violations.

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesDamages

[Return to Text](#)

FOOTNOTES:

(n1)Footnote 1. *In re New Era, Inc.*, 135 F.3d 1206 (7th Cir. 1998) (debtor may not enforce automatic stay to protect estate).

(n2)Footnote 2. *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940) ; *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997) ; *In re Schwartz*, 954 F.2d 569, 26 C.B.C.2d 649 (9th Cir. 1992) ; *Smith v. First America Bank, N.A. (In re Smith)*, 876 F.2d 524 (6th Cir. 1989) ; *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 17 C.B.C.2d 1415 (2d Cir. 1987) , cert. denied, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1989) ; *Morgan Guaranty Trust Co. of New York v. American Sav. & Loan Ass'n*, 804 F.2d 1487 (9th Cir. 1986) , cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987) ; *In re Advent Corp.*, 24 B.R. 612 (Bankr. 1st Cir. 1982) . An exception may exist in rare cases on equitable grounds. *Matthews v. Rosene*, 739 F.2d 249 (7th Cir. 1989) ; *In re Albany Partners, Ltd.*, 749 F.2d 670, 12 C.B.C.2d 244 (11th Cir. 1984) (dictum); *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 7 C.B.C.2d 1009 (1st Cir. 1982) ; *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 7 C.B.C.2d 209 (11th Cir. 1982) .

(n3)Footnote 3. *In re Jones*, 63 F.3d 411 (5th Cir. 1995) ; *Bronson v. United States*, 46 F.3d 1573 (Fed. Cir. 1995) ; *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911, 28 C.B.C.2d 1002, 1008 (6th Cir. 1993) ("actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances"); *Job v. Calder (In re Calder)*, 907 F.2d 953, 23 C.B.C.2d 677 (10th Cir. 1990) ; *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989) .

(n4)Footnote 4. *In re Siciliano*, 13 F.3d 748, 30 C.B.C.2d 667 (3d Cir. 1994) .

(n5)Footnote 5. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997) ; *In re Schwartz*, 954 F.2d 569, 26 C.B.C.2d 649 (9th Cir. 1992) .

(n6)Footnote 6. *In re Schwartz*, 954 F.2d 569, 26 C.B.C.2d 649 (9th Cir. 1992) .

(n7)Footnote 7. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997) .

(n8)Footnote 8. *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539 (11th Cir. 1996) ; *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444 (10th Cir. 1990) (stay violations may be punishable under this subsection, if applicable, or as contempt under 11 U.S.C. § 105).

(n9)Footnote 9. See, e.g., *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778 (8th Cir. 1987) ; *In re Xavier's of Beville*, 172 B.R. 667 (Bankr. M.D. Fla. 1994) ; *In re Fry*, 122 B.R. 427 (Bankr. N.D. Okla. 1990) ; see also *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976) , cert. denied, 429 U.S. 1093, 97 S. Ct., 1107, 51 L. Ed. 2d 540 , reh'g denied, 430 U.S. 976, 97 S. Ct. 1670, 52 L. Ed. 2d 372 (1977) .

(n10)Footnote 10. See *Homer Nat'l Bank v. Namie*, 96 B.R. 652, 654 (W.D. La. 1989) ; see also *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976) , cert. denied, 429 U.S. 1093, 97 S. Ct., 1107, 51 L. Ed. 2d 540 , reh'g denied, 430 U.S. 976, 97 S. Ct. 1670, 52 L. Ed. 2d 372 (1977) .

(n11)Footnote 11. *Vahlsing v. Commercial Union Ins. Co.* 928 F.2d 486, 489 (1st Cir. 1991) ("Violation of the stay, ... is not a strict liability tort."); see also *Smith v. First America Bank, N.A. (In re Smith)*, 876 F.2d 524 (6th Cir. 1989) ; *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 7 C.B.C.2d 1009 (1st Cir. 1982) ; *Foreston Coal Int'l, Inc. v. Red Ash Coal & Coke Corp.*, 18 C.B.C.2d 1414, 83 B.R. 399 (W.D. Va. 1988) .

(n12)Footnote 12. *In re Wright*, 75 B.R. 414 (M.D. Fla. 1987) .

(n13)Footnote 13. See *In re Taylor*, 190 B.R. 459 (Bankr. S.D. Fla. 1995) ; *Mitchell Constr. Co. v. Smith (In re Smith)*, 180 B.R. 311 (Bankr. N.D. Ga. 1995) .

(n14)Footnote 14. 902 F.2d 1098, 1104, 22 C.B.C.2d 1385, 1392-93 (2d Cir. 1990) .

(n15)Footnote 15. 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 C.B.C.2d 1199 (1996) .

(n16)Footnote 16. See P 106.02[2][b] *supra*.

(n17)Footnote 16a. 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945, 54 C.B.C.2d 1233 (2006) .

(n18)Footnote 16b. *Florida Dep't of Revenue v. Omine (In re Omine)*, 485 F.3d 1305, 57 C.B.C.2d 1825 (11th Cir. 2007) .

(n19)Footnote 17. See *Brown v. Ramsay (In re Ragar)*, 3 F.3d 1174, 29 C.B.C.2d 1005 (8th Cir. 1993) (collecting cases on divergent views of bankruptcy court's contempt power). The Advisory Committee Notes to the 1987 amendments state that amended *Fed. R. Bankr. P. 9020* "recognizes that bankruptcy judges may not have the power to punish for contempt." See ch. 9020 *infra*; see also *In re Just Brakes Corporate Sys., Inc.*, 108 F.3d 881 (8th Cir. 1997) ("Congress has conferred no power to punish for a violation of § 362(a), other than the punitive damage authority in § 362(h)"; the court found that the bankruptcy court retains the power to remedy, but not to punish, stay violations).

(n20)Footnote 18. *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 107 (9th Cir. 1995) ; *Mutual Benefit Life Ins. Co. v. Pinetree, Ltd.*, 876 F.2d 34 (5th Cir. 1989) ; *In re Washtenaw/Huron Inv. Corp. No. 8*, 160 B.R. 74 (E.D. Mich. 1993) .

(n21)Footnote 19. See P 362.07[6][a] *supra*.

(n22)Footnote 20. 11 U.S.C. § 362(k) has been held to create a private right of action for one damaged by a willful violation of the stay. *Pettitt v. Baker*, 876 F.2d 456 (5th Cir. 1989) . An award of damages under 11 U.S.C. § 362(k) must have a sufficient factual foundation. *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224 (9th Cir. 1989) ; *Archer v. Macomb County Bank*, 853 F.2d 497, 19 C.B.C.2d 1279 (6th Cir. 1988) (award of compensatory damages not supported by evidence).

(n23)Footnote 21. *In re Repine*, 536 F.3d 512 (5th Cir. 2008) ; *In re Ocasio*, 272 B.R. 815 (B.A.P. 1st Cir. 2002) ; *Promower, Inc. v. Scuderi (In re Promower, Inc.)*, 74 B.R. 49 (D. Md. 1987) ; *In re Henry*, 266 B.R. 457 (Bankr. C.D. Cal. 2001) .

(n24)Footnote 22. *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 71 C.B.C.2d 758 (11th Cir. 2014) (emotional distress damages are available if a causal connection between the significant emotional distress and the violation of the automatic stay is clearly established); *In re Dawson*, 390 F.3d 1139, 1148 (9th Cir. 2004) ; *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999) ; *In re Flynn*, 185 B.R. 89 (S.D. Ga. 1995) . But see *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001) . Courts are not in agreement as to whether emotional distress damages may be awarded against the federal government. Compare *In re Duby*, 451 B.R. 664 (B.A.P. 1st Cir. 2011) (sovereign immunity has not been waived under section 106 for emotional distress damages), with *In re Griffin*, 415 B.R. 64 (Bankr. N.D. N.Y. 2009) (awarding emotional distress damages against the Social Security Administration), and *In re Covington*, 256 B.R. 463 (Bankr. D.S.C. 2000) (awarding emotional distress damages against the Internal Revenue Service).

(n25)Footnote 23. *In re Johnson*, 501 F.3d 1163 (10th Cir. 2007) ; *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298 (5th Cir. 2005) ; *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999) ; *In re Lansdale Family Restaurants, Inc.*, 977 F.2d 826, 829 (3d Cir. 1992) (act done intentionally with knowledge that bankruptcy petition has been filed is willful violation of stay).

(n26)Footnote 24. *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) ; *Halas v. Platek*, 239 B.R. 784 (N.D. Ill. 1999) (state court denial of section 362(b) was not *res judicata*).

(n27)Footnote 25. See P 362.11 *supra*.

(n28)Footnote 26. 595 F.3d 937 (9th Cir. 2010) .

(n29)Footnote 27. 595 F.3d 937, 947-48. *Contra DUBY v. United States (In re DUBY)*, 451 B.R. 664 (B.A.P. 1st Cir. 2011) (statutory language is not ambiguous and plainly provides for attorneys' fees incurred in recovering damages); *In re Grine*, 439 B.R. 461 (Bankr. N.D. Ohio 2010).

(n30)Footnote 28. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) (finding that the common purpose of both the Clean Air Act and Civil Rights Attorney's Fees Awards Act of 1976 to "promote citizen enforcement of important federal policies" compelled that both attorney's fee provisions be construed in the same manner, thereby permitting recovery for work done in an administrative hearing rather than traditional judicial litigation); *see also Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991) (Fair Debt Collection Practices Act "mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general"); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978) ("scheme of [Truth in Lending Act] is to create a system of private attorneys general to aid its enforcement, and its language should be construed liberally in light of its remedial purpose").

(n31)Footnote 29. 595 F.3d 937, 946 n.3.

(n32)Footnote 30. *Young v. Repine (In re Repine)*, 536 F.3d 512, 522 (5th Cir. 2008).

(n33)Footnote 31. *Id.*

(n34)Footnote 31a. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1098 (9th Cir. 2015).

(n35)Footnote 31b. *See Walsh v. UGI Utils., Inc. (In re Walsh)*, 518 B.R. 288 (Bankr. M.D. Pa. 2014) (court refused to dismiss stay violation complaint based on section 342(g) where debtor alleged that creditor had actual knowledge of bankruptcy filing); *Murray v. Haugen (In re Murray)*, 2013 Bankr. LEXIS 5384 (Bankr. N.D. Cal. Dec. 24, 2013) ("safe harbor" from monetary damages under section 342(g)(2) did not apply because creditor had actual knowledge of the bankruptcy evidenced by his filing of a proof of claim and service of the order for relief on his attorney).

(n36)Footnote 32. *See, e.g., In re Just Brakes Corporate Sys., Inc.*, 108 F.3d 881 (8th Cir. 1997); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 36 C.B.C.2d 1270 (11th Cir. 1996); *Environmental Corp. v. Knight (In re Goodman)*, 991 F.2d 613 (9th Cir. 1993).

(n37)Footnote 33. 920 F.2d 183 (2d Cir. 1993).

(n38)Footnote 34. 804 F.2d 289, 15 C.B.C.2d 1025 (4th Cir. 1986); *see also In re Atlantic Business and Community Corp.*, 901 F.2d 325, 22 C.B.C.2d 1176 (3d Cir. 1990).

(n39)Footnote 35. 804 F.2d 289, 292, 15 C.B.C.2d 1025, 1028.

(n40)Footnote 36. 67 F.3d 187 (9th Cir. 1995) (trustee not an individual); *see also Sensenich v. Ledyard Nat'l Bank (In re Campbell)*, 398 B.R. 799 (Bankr. D. Vt. 2008); *In re Glenn*, 379 B.R. 760 (Bankr. N.D. Ill. 2007).

(n41)Footnote 37. 186 B.R. 414 (E.D. Ill. 1995) (trustee is an individual).

(n42)Footnote 38. *Pub. L. No. 98-353*, § 304 (1984), *reprinted in* App. Pt. 6(a) *infra*.

(n43)Footnote 39. *See, e.g., In re Pace*, 67 F.3d 187 (9th Cir. 1995) (although trustee could not recover costs under section 362(h), trustee could recover similarly upon a finding of contempt); *In re Ormond Beach Assocs. Ltd. P'ship*, 185 B.R. 408 (Bankr. D. Conn. 1995).

PROOF OF SERVICE
Arnold Leong v. Warren Havens, et al.
Alameda Superior Court No. 2002-070640

I am employed in the City and County of San Francisco by the law firm of Bullivant Houser Bailey ("the business"), 235 Pine Street, Suite 1500, San Francisco, CA 94104. I am over the age of eighteen (18) and not a party to this action. On October 14, 2016, I served the document entitled:

**OPPOSITION TO MOTION OF RECEIVER FOR AN ORDER
APPROVING SALE OF WIRELESS SPECTRUM ASSETS TO PTC-220
LLC**

upon the following parties:

PAUL F. KIRSCH
JAMES M. ROBINSON
Shopoff Cavallo & Kirsch LLP
601 Montgomery Street, Suite 1110
San Francisco, CA 94111
Telephone: 415-984-1975
Facsimile: 415-984-1978
Email: paul@scklegal.com
james@scklegal.com
Attorneys for: Plaintiff ARNOLD LEONG

RICHARD W. OSMAN
Bertrand, Fox, Elliot, Osman & Wenzel
2749 Hyde Street
San Francisco, CA 94109
Telephone: 415-353-0999
Facsimile: 415-353-0990
Email: rosman@bfesf.com
Attorneys for: Plaintiff ARNOLD LEONG

GERALDINE FREEMAN
DAVID A. DEGROOT
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: 415-434-9100
Facsimile: 415-434-3947
Email: gfreeman@sheppardmullin.com
ddegroot@sheppardmullin.com
Attorneys for: Receiver SUSAN UECKER

- (X) **BY MAIL (CCP §1013(a)):** I am readily familiar with the ordinary practice of the business with respect to the collection and processing of correspondence for mailing with the United States Postal Service. I placed a true and correct copy of the above-titled document in an envelope addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed it for collection and mailing by the United States Postal Service in accordance with the ordinary practice of the business. Correspondence so placed is ordinarily deposited by the business with the United States Postal Service on the same day.
- (X) **BY ELECTRONIC TRANSFER:** I caused all of the pages of the above-entitled document to be sent to the recipient indicated via email at the respective email addresses. This document was transmitted by email and transmission reported without error.
- () **BY FACSIMILE TRANSMISSION (CCP §1013(e), CRC 2.306):** I transmitted the document by facsimile transmission by placing it in a facsimile machine (telephone number 415-352-2701) and transmitting it to the facsimile machine telephone number listed above. A transmission report was properly issued by the transmitting facsimile

1 machine. The transmission was reported as complete and without error. A true and correct
2 copy of the transmission report is attached hereto.

3 () **BY OVERNIGHT DELIVERY (CCP §1013(c))**: I am readily familiar with the ordinary
4 practice of the business with respect to the collection and processing of correspondence
5 for mailing by Express Mail and other carriers providing for overnight delivery. I placed
6 a true and correct copy of the above-titled document in an envelope addressed as above,
with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed
it for collection and mailing by Express Mail or other carrier for overnight delivery in
accordance with the ordinary practice of the business. Correspondence so placed is
ordinarily deposited by the business with Express Mail or other carrier on the same day.

7 () **BY PERSONAL SERVICE UPON AN ATTORNEY (CCP §1011(a))**: I placed a true
8 and correct copy of the above-titled document in a sealed envelope addressed as indicated
9 above. I delivered said envelopes by hand to a receptionist or a person authorized to accept
same at the address on the envelope, or, if no person was present, by leaving the envelope
in a conspicuous place in the office between the hours of nine in the morning and five in
the afternoon.

10 () **BY HAND**: Pursuant to Code of Civil Procedure §1011, I directed said envelope to the
11 party so designated on the service list to be delivered by courier this date. A proof of
12 service by hand executed by the courier shall be filed/lodged with the court under separate
cover.

13 () **BY PERSONAL SERVICE UPON A PARTY (CCP §1011(b))**: I placed a true and
14 correct copy of the above-titled document in a sealed envelope addressed as indicated
15 above. I delivered each envelope by hand to a person of not less than eighteen (18) years
of age at the address listed on the envelope, between the hours of eight in the morning and
six in the evening.

16 I declare under penalty of perjury, under the laws of the State of California, that the
17 foregoing is true and correct.

18 Executed on October 14, 2016, at San Francisco, California.

19 
20 Debora J. Fong

21 *****
22
23
24
25
26
27
28

EXHIBIT 2

ENDORSED
FILED
ALAMEDA COUNTY

OCT 14 2016

By SUE PESKO

1 Andrew B. Downs, SBN 111435
2 C. Todd Norris, SBN 181337
3 Norman J. Ronneberg, Jr., SBN 68233
4 BULLIVANT HOUSER BAILEY PC
5 235 Pine Street, Suite 1500
6 San Francisco, California 94104-2752
7 Telephone: 415.352.2700
8 Facsimile: 415.352.2701
9 E-Mail: andy.downs@bullivant.com
10 todd.norris@bullivant.com
11 norman.ronneberg@bullivant.com

12 Attorneys for Defendant
13 WARREN HAVENS

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA

16 ARNOLD LEONG,

17 Plaintiff,

18 v.

19 WARREN HAVENS, et al.

20 Defendants.

Case No.: 2002-070640

**OPPOSITION TO RECEIVER'S
MOTION TO FILE PORTIONS OF
CERTAIN DOCUMENTS SUPPORTING
MOTION TO APPROVE SALE TO PTC-
220 UNDER SEAL**

**DATE: October 27, 2016
TIME: 3:45 p.m.
DEPT: 24 (Hon. Frank Roesch)**

Reservation No.: R-1786696

21 **I. INTRODUCTION**

22 Defendant Warren Havens files this opposition without waiver of his position that this
23 action is presently stayed pursuant to the "automatic stay" under 11 U.S.C. § 362 of the
24 bankruptcy code, as explained in more detail in Haven's opposition to the Receiver's Motion
25 For an Order Approving Sale of Wireless Spectrum Assets to PTC-220 LLC (filed herewith)
26 and elsewhere in the record for this action, referencing the involuntary bankruptcy action of the
27 "Leong Partnership." Havens reserves all rights with respect to the Receiver's continuing
28 violations of the applicable automatic stay and other bankruptcy law. This filing is made
subject to approval or other action the bankruptcy court may impose to protect the subject estate
of the alleged Debtor "Leong Partnership."

- 1 -

OPPOSITION TO RECEIVER'S MOTION TO FILE PORTIONS OF DOCUMENTS RE PTC-220 UNDER

1 **II. PARAGRAPHS 5 THROUGH 10 OF THE WEIMER DECLARATION MUST**
2 **NOT BE SEALED**

3 None of the content in paragraphs five (5) through ten (10) of the Weimer declaration
4 meet any of the standards for sealing documents under California Rules of Court 2.550 et seq.
5 These paragraphs do not contain confidential information and do not contain the terms and
6 conditions of the PTC-220 deal. It is apparent that the Receiver seeks to seal this portion of the
7 Weimer declaration not for any legitimate purpose, but rather to enable Mr. Weimer to speak
8 out of both sides of his mouth, telling this court one thing, while telling the FCC something
9 different, including but not limited to, in informal non-recorded meetings or in other writings
10 outside of the formal FCC public proceedings (as reflected in FCC records released under
11 FOIA).

12 The Receiver's and Mr. Leong's long course of actions to date include extensive public
13 filings in this case, and before the FCC, that have severely damaged and jeopardized the
14 existence of the Receivership Entities and their FCC licenses, including their business and
15 goodwill. The Receiver should not be permitted to conceal her filings in this Court from the
16 FCC or the public, and this Court should not aid the Receiver's efforts to present inconsistent
17 positions concerning the merits of matters being litigated before the FCC.

18 Moreover, FCC rules and policies require that any licensee or controller or owner of a
19 licensee must be truthful and candid before the FCC. The FCC sanctions licensees and
20 controllers of licensees for lack of candor and misrepresentations, including revocation of
21 licenses. *See e.g., 47 CFR §1.17 and §1.52 and the Commission's 1985 Character Policy*
22 *Statement. Thus, whether or not this court seals paragraphs 5 through 10 of the Weimer*
23 *declaration, the Receiver and her counsel must not take inconsistent positions before this court*
24 *and the FCC, or they will put the entities (and themselves) at risk of sanctions for lack of candor*
25 *and/or misrepresentations. Consequently, there is no legitimate or sound reason to keep Mr.*
26 *Weimer's arguments, opinions and representations made to this court in paragraphs 5 to 10 of*
27 *his declaration a secret.*

28 ///

1 Finally, the core matters in this State Court action (the "Sippel Order" and all FCC
2 licensing matters, etc.) are subject to the exclusive jurisdiction of the FCC. FCC licensing is
3 based solely on the "public interest" standard running through the Federal Communications Act,
4 and the federal standard of what can be kept confidential under FCC law should apply therefore
5 apply in this action. The FCC confidentiality standard is the same as the Federal Freedom of
6 Information Act ("FOIA"). See FCC Rules, 47 C.F.R. §§ 0.457 to 0.461. Under those
7 standards, only specific information in the Weimer declaration that constitute confidential trade
8 secrets, competitive business records, and the like can be kept confidential.

9 **III. CONCLUSION**

10 Because the Receiver has not met her burden of establishing any legitimate grounds for
11 sealing paragraphs 5 through 10 of the Weimer Declaration, this Court should deny the
12 Receiver's motion with respect to paragraphs 5 through 10 of the Weimer Declaration. The
13 rationale behind sealing is not to enable parties to have their cake and eat it too by allowing
14 them to take inconsistent positions depending on the forum in which they are litigating.

15 DATED: October 14, 2016

16 BULLIVANT HOUSER BAILEY PC

17
18 By 

19 Andrew B. Downs

20 C. Todd Norris

21 Norman J. Ronneberg, Jr.

22 Attorneys for Defendant Warren Havens

23 4851-8961-9515.1

PROOF OF SERVICE
Arnold Leong v. Warren Havens, et al.
Alameda Superior Court No. 2002-070640

I am employed in the City and County of San Francisco by the law firm of Bullivant Houser Bailey ("the business"), 235 Pine Street, Suite 1500, San Francisco, CA 94104. I am over the age of eighteen (18) and not a party to this action. On October 14, 2016, I served the document entitled:

**OPPOSITION TO RECEIVER'S MOTION TO FILE PORTIONS OF
CERTAIN DOCUMENTS SUPPORTING MOTION TO APPROVE SALE
TO PTC-220 UNDER SEAL**

upon the following parties:

PAUL F. KIRSCH
JAMES M. ROBINSON
Shopoff Cavallo & Kirsch LLP
601 Montgomery Street, Suite 1110
San Francisco, CA 94111
Telephone: 415-984-1975
Facsimile: 415-984-1978
Email: paul@scklegal.com
james@scklegal.com
Attorneys for: Plaintiff ARNOLD LEONG

RICHARD W. OSMAN
Bertrand, Fox, Elliot, Osman & Wenzel
2749 Hyde Street
San Francisco, CA 94109
Telephone: 415-353-0999
Facsimile: 415-353-0990
Email: rosman@bfesf.com
Attorneys for: Plaintiff ARNOLD LEONG

GERALDINE FREEMAN
DAVID A. DEGROOT
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: 415-434-9100
Facsimile: 415-434-3947
Email: gfreeman@sheppardmullin.com
ddegroot@sheppardmullin.com
Attorneys for: Receiver SUSAN UECKER

- (X) **BY MAIL (CCP §1013(a)):** I am readily familiar with the ordinary practice of the business with respect to the collection and processing of correspondence for mailing with the United States Postal Service. I placed a true and correct copy of the above-titled document in an envelope addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed it for collection and mailing by the United States Postal Service in accordance with the ordinary practice of the business. Correspondence so placed is ordinarily deposited by the business with the United States Postal Service on the same day.
- (X) **BY ELECTRONIC TRANSFER:** I caused all of the pages of the above-entitled document to be sent to the recipient indicated via email at the respective email addresses. This document was transmitted by email and transmission reported without error.
- () **BY FACSIMILE TRANSMISSION (CCP §1013(e), CRC 2.306):** I transmitted the document by facsimile transmission by placing it in a facsimile machine (telephone number 415-352-2701) and transmitting it to the facsimile machine telephone number listed above. A transmission report was properly issued by the transmitting facsimile

1 machine. The transmission was reported as complete and without error. A true and correct
2 copy of the transmission report is attached hereto.

3 (**) BY OVERNIGHT DELIVERY (CCP §1013(c))**: I am readily familiar with the ordinary
4 practice of the business with respect to the collection and processing of correspondence
5 for mailing by Express Mail and other carriers providing for overnight delivery. I placed
6 a true and correct copy of the above-titled document in an envelope addressed as above,
with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed
it for collection and mailing by Express Mail or other carrier for overnight delivery in
accordance with the ordinary practice of the business. Correspondence so placed is
ordinarily deposited by the business with Express Mail or other carrier on the same day.

7 (**) BY PERSONAL SERVICE UPON AN ATTORNEY (CCP §1011(a))**: I placed a true
8 and correct copy of the above-titled document in a sealed envelope addressed as indicated
9 above. I delivered said envelopes by hand to a receptionist or a person authorized to accept
same at the address on the envelope, or, if no person was present, by leaving the envelope
in a conspicuous place in the office between the hours of nine in the morning and five in
the afternoon.

10 (**) BY HAND**: Pursuant to Code of Civil Procedure §1011, I directed said envelope to the
11 party so designated on the service list to be delivered by courier this date. A proof of
12 service by hand executed by the courier shall be filed/lodged with the court under separate
cover.

13 (**) BY PERSONAL SERVICE UPON A PARTY (CCP §1011(b))**: I placed a true and
14 correct copy of the above-titled document in a sealed envelope addressed as indicated
15 above. I delivered each envelope by hand to a person of not less than eighteen (18) years
of age at the address listed on the envelope, between the hours of eight in the morning and
six in the evening.

16 I declare under penalty of perjury, under the laws of the State of California, that the
17 foregoing is true and correct.

18 Executed on October 14, 2016, at San Francisco, California.

19 
20 Debora J. Fong

21 *****
22
23
24
25
26
27
28

EXHIBIT 3

From: David DeGroot [mailto:DDeGroot@sheppardmullin.com]

Sent: Wednesday, September 14, 2016 3:22 PM

To: Downs, Andrew <andy.downs@bullivant.com>; #San Francisco Docketing <sanfranciscodocketing@bullivant.com>; Norris, Todd <Todd.Norris@bullivant.com>; James Robinson <james@scklegal.com>; Paul Kirsch <paul@scklegal.com>; Richard Osman <rosman@bfesf.com>

Cc: David DeGroot <DDeGroot@sheppardmullin.com>

Subject: Leong v. Havens - order re MCLM's transfer to SCRRA

All,

The Receiver understands that the FCC entered the attached order earlier today. After reviewing and considering it, the Receiver has no plans to seek review or reconsideration of this order at the FCC.

If either of the parties wishes for the Receiver to take a different position, please advise what position your client believes should be taken, and why. If the Receiver disagrees with any proposal, either of the parties may seek a court order instructing the Receiver.

Please advise if you have other concerns or questions.

Best regards,
David

David DeGroot

415.774.3230 | direct

415.403.6062 | direct fax

DDeGroot@sheppardmullin.com | [Bio](#)

SheppardMullin

Sheppard Mullin Richter & Hampton LLP

Four Embarcadero Center, 17th Floor

San Francisco, CA 94111-4109

415.434.9100 | main

www.sheppardmullin.com

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Maritime Communications/Land Mobile, LLC)	WT Docket No. 10-83
and Southern California Regional Rail Authority)	
File Applications to Modify License and Assign)	File Nos. 0004144435 and 0004153701
Spectrum for Positive Train Control Use, and)	
Request Part 80 Waivers)	

ORDER

Adopted: September 14, 2016

Released: September 14, 2016

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. DISCUSSION	9
A. Standing	11
B. Alleged Prejudice.....	16
C. MCLM's Character Qualifications	19
D. Incorporation of Other Pleadings.....	20
E. Part 80 Rule Waiver Requests	22
F. Reclassification of AMTS Spectrum	41
IV. CONCLUSION AND ORDERING CLAUSES	47

I. INTRODUCTION

1. In this *Order*, we grant an application—as amended June 8, 2016—to assign spectrum to the Southern California Regional Rail Authority (SCRRA)¹ to facilitate its deployment of a positive train control (PTC) system for the Metrolink commuter railroad (Metrolink). Specifically, we approve the partitioning of an area comprising Metrolink's six-county service territory,² from Automated Maritime

¹ FCC File No. 0004144435 (filed Mar. 8, 2010, amended Oct. 20, 2015, and June 8, 2016) (Assignment Application). SCRRA is a Joint Powers Authority of five county transportation planning agencies: the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, the San Bernardino Associated Governments, and the Ventura County Transportation Commission. Request for Waivers, FCC File No. 0004144435, at 2 (filed Mar. 8, 2010) (SCRRA Waiver Request).

² The six counties are: Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura. Description of Proposed Modification and Public Interest Statement, FCC File No. 0004153701, at 1 (filed Mar. 3, 2010) (SCRRA Public Interest Statement).

Telecommunications System (AMTS) Station WQGF318,³ licensed to Maritime Communications/Land Mobile, LLC (MCLM), Debtor-in-Possession, to SCRRA.⁴ We also approve SCRRA's related request for waiver of certain AMTS rules to facilitate Metrolink's PTC deployment,⁵ and we grant an application to modify the regulatory status of the AMTS spectrum for private PTC use.⁶

II. BACKGROUND

2. *SCRRA*. SCRRA oversees the Metrolink commuter railroad.⁷ Metrolink operates seven train lines serving 55 train stations on over 500 track miles.⁸ On an average weekday, Metrolink runs 165 trains and serves more than 40,000 commuters.⁹ Metrolink trains operate over rail rights-of-way owned by SCRRA member agencies,¹⁰ Burlington Northern Santa Fe Railroad, Union Pacific Railroad, and the North County Transit District (NCTD).¹¹

3. *Rail Safety Improvement Act of 2008*. Congress established the PTC mandate in the Rail Safety Improvement Act of 2008 (RSIA)¹² following a catastrophic rail accident in Chatsworth, California, where, on September 12, 2008, a Metrolink commuter train collided head-on with a Union Pacific freight train, killing 25 passengers and injuring more than 100 other passengers.¹³ The National Transportation Safety Board (NTSB) found that a Metrolink engineer failed to appropriately respond to a red signal, and that a PTC system¹⁴ would have stopped the Metrolink train short of the red signal

³ There are two AMTS spectrum blocks in 10 geographic license areas: Block A (217.5-218/219.5-220 MHz) and Block B (217-217.5/219-219.5 MHz). See 47 CFR § 80.385(a)(2) and (3). Station WQGF318 is the Southern Pacific (AMT006) A Block license.

⁴ On August 1, 2011, MCLM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. *In re Maritime Communications/Land Mobile, LLC*, No. 11-13463-DWH (Bankr. N.D. Miss.). The Commission subsequently approved MCLM's application for the involuntary assignment of its licenses to MCLM as a debtor-in-possession, reflecting the bankruptcy filing. FCC File No. 0004851459 (filed Aug. 26, 2011). Regarding events that occurred after MCLM's bankruptcy filing, the term "MCLM" herein refers to the company as debtor-in-possession.

⁵ SCRRA Waiver Request. SCRRA filed two amendments narrowing the scope of the waiver request. See Minor Amendment, FCC File No. 0004144435 (filed Oct. 20, 2015) (Minor Amendment); see also Second Minor Amendment, FCC File No. 0004144435 (filed June 8, 2016) (Second Minor Amendment).

⁶ FCC File No. 0004153701 (filed Mar. 8, 2010, amended Aug. 30, 2011) (Modification Application). See *infra* discussion at paragraphs 41-46. We collectively refer to the Assignment Application and the Modification Application as the SCRRA Applications.

⁷ SCRRA Public Interest Statement at 1.

⁸ See Metrolink Fact Sheet at 1, http://www.metrolinktrains.com/pdfs/Facts&Numbers/Fact_Sheets/Fact_Sheet_2016_Q2.pdf (last visited August 16, 2016).

⁹ *Id.*

¹⁰ See *supra* note 1.

¹¹ Metrolink Fact Sheet at 1 n.1. Further information regarding the NCTD is available at <http://www.gonctd.com/nctd-overview> (last visited August 16, 2016).

¹² See Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4857 (2008), amended by the Positive Train Control Enforcement and Implementation Act of 2015, Pub. L. No. 114-73, § 1302, 129 Stat. 568, 576 (2015).

¹³ National Transportation Safety Board, Collision of Metrolink Train 111 with Union Pacific Train LOF65-12 Chatsworth, California, Accident Report No. RAR-10/01 at vii (2010), <http://www.nts.gov/investigations/AccidentReports/Reports/RAR1001.pdf>.

¹⁴ Once implemented, PTC systems are designed to reduce the risk of human-error rail accidents, by "prevent[ing] train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position." 49 U.S.C. § 20157(i)(5).

preventing the fatal collision.¹⁵

4. The RSIA requires all trains providing passenger service and freight trains operating on lines carrying toxic and poisonous-by-inhalation hazardous materials to implement interoperable¹⁶ PTC systems by December 31, 2018.¹⁷ The U.S. rail industry has chosen to implement PTC using radio spectrum that creates wireless networks with the capacity to enable real-time information sharing between trains, rail wayside devices, and “back office” applications, regarding train movement authorities, speed restrictions, train position and speed, and the state of signal and switch devices.

5. *SCRRRA Applications.* On March 29, 2010, the Wireless Telecommunications Bureau (Bureau) issued a public notice requesting comment on the SCRRRA Applications.¹⁸ The Federal Railroad Administration (FRA),¹⁹ the Los Angeles County Board of Supervisors,²⁰ PTC-220, LLC—a consortium of the nation’s Class I freight railroads²¹—the Riverside County Board of Supervisors,²² and the Ventura County Transportation Commission²³ each filed comments supporting the SCRRRA Applications. Warren Havens (Havens) and five associated entities of which he is President (collectively, with Mr. Havens, the

¹⁵ NTSB, Collision of Metrolink Train 111 with Union Pacific Train LOF65-12 Chatsworth, California, Accident Report No. RAR-10/01 at vii (2010), <http://www.nts.gov/investigations/AccidentReports/Reports/RAR1001.pdf>.

¹⁶ Interoperability is defined as “the ability to control locomotives of the host railroad and tenant railroad to communicate with and respond to the positive train control system, including uninterrupted movements over property boundaries.” 49 U.S.C. § 20157(i)(3).

¹⁷ Congress initially established a December 31, 2015, deadline to implement PTC. *See* Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4857 (2008). In October 2015, Congress extended the PTC deadline by three years, until December 31, 2018, after it became apparent that the rail industry faced challenges meeting the 2015 implementation deadline. *See* Positive Train Control Enforcement and Implementation Act of 2015, Pub. L. No. 114-73, § 1302, 129 Stat. 568, 576 (2015). *See also* Senate Commerce Committee, Fact Sheet: Positive Train Control Extension, <https://www.commerce.senate.gov/public/index.cfm/fact-sheets?ID=D312B38B-8EC6-40E7-9ADD-DF2FACA27B48> (last visited August 16, 2016). Railroads may request up to a 24-month extension of the December 31, 2018, deadline in limited circumstances. *See* 49 U.S.C. § 20157(a)(2)(B).

¹⁸ *Maritime Communications/Land Mobile, LLC and Southern California Regional Rail Authority File Applications To Modify License and Assign Spectrum for Positive Train Control Use, and Request Part 80 Waivers*, Public Notice, 25 FCC Rcd 3171 (WTB MD 2010) (*MCLM/SCRRRA Public Notice*).

¹⁹ Letter from Joseph C. Szabo, Administrator, Federal Railroad Administration, to Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC (Apr. 16, 2010) (on file in WT Docket No. 10-83) (FRA Letter). The FRA is responsible for overseeing PTC implementation, and adopted final PTC requirements on January 10, 2010. *See* Positive Train Control (PTC) Information (R&D), Federal Railroad Administration, <https://www.fra.dot.gov/Page/P0152> (last visited Aug. 16, 2016) (information regarding FRA’s oversight of PTC implementation).

²⁰ Letter from Don Knabe, Supervisor, Fourth District, Los Angeles County Board of Supervisors, to Marlene H. Dortch, Secretary, FCC (Apr. 19, 2010) (on file in WT Docket No. 10-83).

²¹ PTC-220 Comments, WT Docket 10-83 (filed Apr. 28, 2010). At the time, four of the nation’s Class I Railroads were members of PTC-220: Burlington Northern Santa Fe Corporation, CSX Corporation, Norfolk Southern Railway, and Union Pacific Railroad. *Id.* at 1. The three remaining U.S. Class I Railroads—Canadian National Railway, Canadian Pacific Railway, and Kansas City Southern Railway—subsequently joined PTC-220. *See also* Letter from Edwin F. Kemp, President, PTC-220, to Marlene H. Dortch, Secretary, FCC (Oct. 29, 2010) (on file in WT Docket No. 10-83).

²² Letter from Marion Ashley, Chairman, Riverside County Board of Supervisors, to Marlene H. Dortch, Secretary, FCC (Apr. 16, 2010) (on file in WT Docket No. 10-83).

²³ Letter from Darren M. Kettle, Executive Director, Ventura County Transportation Commission, to Marlene Dortch, Secretary, FCC (Apr. 20, 2010) (on file in WT Docket No. 10-83).

“Havens Entities”)²⁴ filed a Petition to Deny the SCRRA Applications.²⁵ The Havens Entities also filed numerous other pleadings opposing the SCRRA Applications.²⁶

6. Consideration of the SCRRA Applications was impacted by the Commission’s decision, on April 18, 2011, to issue an *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (HDO)*.²⁷ The *HDO* commenced a hearing before an Administrative Law Judge to determine whether MCLM has the requisite character qualifications to be a Commission licensee. Issuance of the *HDO* ordinarily would have stayed consideration of the SCRRA Applications under the Commission’s *Jefferson Radio* policy, which provides that a license may not be assigned or transferred when the licensee’s qualifications to hold it are at issue.²⁸ The Commission, however, found that “the potential safety of life considerations involved in the positive train control area,” warranted possible removal of the SCRRA Applications from the hearing.²⁹ The Commission stated that it would “upon an appropriate showing by the Parties, consider whether . . . the public interest would be served by allowing” removal of the SCRRA Applications from the hearing.³⁰ Numerous pleadings were subsequently filed regarding possible removal of the SCRRA Applications from the hearing.³¹

²⁴ The five entities are Environmental LLC (ENL), Intelligent Transportation & Monitoring Wireless LLC (ITL), Skybridge Spectrum Foundation (SSF), Telesaurus Holdings GB LLC (THL), and Verde Systems LLC (VSL).

²⁵ Petition to Deny, and in the Alternative Section 1.41 Request, ULS File Nos. 0004144435 and 0004153701 (filed Apr. 28, 2010) (Havens Petition to Deny). SCRRA filed an Opposition to Petition to Deny on May 10, 2010, in WT Docket No. 10-83 (SCRRA Opposition). MCLM also filed an Opposition to Petition to Deny on May 10, 2010, in ULS File No. 0004144435 and 0004153701.

On November 16, 2015, the Superior Court of Alameda County, California, issued an order appointing Susan L. Uecker (Uecker) as receiver to take control of ENL, ITL, SSF, THL, VSL, and two other entities (Environmental-2 LLC and V2G LLC). *See Arnold Leong v. Warrens Havens, et al.*, Case No. 2002-070640, Order Appointing Receiver After Hearing and Preliminary Injunction (Nov. 16, 2015). On December 17, 2015, Uecker filed several applications to notify the Commission of an involuntary transfer of control of the seven entities. *See, e.g.*, Description of Application and Public Interest Statement, ULS File No. 0007060862 (filed Dec. 17, 2015) (citing 47 CFR § 1.948(c)(2)). The applications were accepted on February 2, 2016. On March 11, 2016, SSF filed a voluntary petition for bankruptcy under Chapter 11 with the U.S. Bankruptcy Court, Delaware District, Case No. 16-10626. The court dismissed that petition on May 6, 2016. *See Skybridge Spectrum Foundation, Debtor*, Case 16-10626-CSS, Doc 120, Order (May 6, 2016).

²⁶ *See* Havens Entities Reply (filed May 10, 2010); ITL, THL, and VSL Reply to Oppositions (filed May 17, 2010) (ITL/THL/VSL Reply); ENL, Havens, and SSF Reply to Oppositions (filed May 17, 2010) (ENL/Havens/SSF Reply); May 27, 2010 Supplement—New Facts, And Request to Accept, ULS File No. 0004144435 (filed May 27, 2010) (filing by the Havens Entities transmitting Errata Version of email from Mr. Havens to FCC staff, dated May 23, 2010, regarding MCLM’s character qualifications); Further Statement in Support of Opposition, Notice of Pending Related Proceedings, and of Future Filings, And Suggested Resolution of Issues in Dispute, ULS File No. 0004144435 (filed July 14, 2010) (Havens Entities Further Statement); Havens Entities Initial Opposition to Motion for Conditional Grant (filed Nov. 10, 2010); Havens Entities Motion to Dismiss Motion for Conditional Grant, or in the Alternative, Opposition to Motion for Conditional Grant (filed Dec. 7, 2010); Havens Entities Reply to Oppositions to Motion to Dismiss Motion for Conditional Grant, or in the Alternative, Opposition to Motion for Conditional Grant (filed Jan. 5, 2011). Mr. Havens filed these pleadings before the Havens Entities were placed in receivership. *See supra* note 25.

²⁷ *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520 (2011) (*HDO*).

²⁸ *See Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

²⁹ *HDO*, 26 FCC Rcd at 6523, para. 7 n.7.

³⁰ *Id.*

³¹ These pleadings are located in WT Docket No. 13-85, EB Docket No. 11-71, and are also attached to more than 20 FCC File Nos., including 0004153701 and 0004144435.

7. On September 10, 2014, in the *MCLM/SCRRRA Order*,³² the Commission removed the SCRRRA Applications from the MCLM hearing finding that it “would serve the public interest by significantly promoting rail safety of life and property” and that the “spectrum in question is uniquely suited to enable [PTC] system interoperability as part of the frequency range that is being deployed nationwide for PTC.”³³ The Commission authorized the Bureau to grant the SCRRRA Applications if it finds that a grant would be consistent with the *MCLM/SCRRRA Order* and relevant Commission rules.³⁴

8. On October 20, 2015, SCRRRA filed a minor amendment to the Assignment Application, which narrowed the scope of its request for waiver of certain Part 80 rules.³⁵ On June 8, 2016, SCRRRA filed a second minor amendment to further narrow the scope of its waiver request.³⁶

III. DISCUSSION

9. In the *MCLM/SCRRRA Order*, the Commission authorized the Bureau to grant the SCRRRA Applications upon finding that such a grant would be consistent with its determinations in that order and relevant Commission rules.³⁷ Based on our careful review of the record before us, we find that grant of the SCRRRA Applications will further the vital public interest in rail safety consistent with the federal PTC mandate, the *MCLM/SCRRRA Order*, and relevant FCC rules as discussed below.

10. We find that only ENL, SSF, and VSL have standing to oppose the SCRRRA Applications, and that there is no merit to their allegations of FCC prejudice. We find that because the Commission removed the SCRRRA Applications from the hearing regarding MCLM’s character qualifications, it is unnecessary to address arguments regarding MCLM’s character qualifications here. We also reject the Havens Entities’ attempt to incorporate their pleadings and arguments from 24 other proceedings into this proceeding. Lastly, we address SCRRRA’s request for waiver of certain Part 80 rules to enable PTC deployment and regulatory reclassification of the AMTS spectrum for private PTC use.

A. Standing

11. We first address whether Mr. Havens or any of the five related entities of which he is President have standing to challenge the SCRRRA Applications. The Havens Entities provide no explanation in their pleadings regarding why Mr. Havens himself would have standing to challenge the SCRRRA Applications, nor are we aware of any basis to afford him standing.

12. THL, which holds spectrum licenses in the 900 MHz band and not AMTS, posits it has standing to contest the SCRRRA Applications because it “may offer competitive services to those that MCLM can provide with the License [Station WQGF318].”³⁸ To establish standing, a petitioner must allege facts sufficient to demonstrate that grant of an application would cause it to suffer a direct injury.³⁹

³² *Maritime Communications/Land Mobile, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 10871 (2014) (*MCLM/SCRRRA Order*), petition for reconsideration pending.

³³ *Id.* at 10883-84, para. 31.

³⁴ *Id.* at 10888, para. 41.

³⁵ Minor Amendment.

³⁶ Second Minor Amendment.

³⁷ *MCLM/SCRRRA Order*, 29 FCC Rcd at 10888, para. 41; *id.* at 10881, para. 26 (“direct[ing] the Bureau to process the applications”).

³⁸ Havens Petition to Deny at 9 & n.4.

³⁹ See *Applications of AT&T Mobility Spectrum LLC*, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16465, para. 16 (2012); *Wireless Co., L.P.*, Order, 10 FCC Rcd 13233, 13235, para. 7 (WTB 1995) (*Wireless Co.*), citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). See also *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002); *Touchtel Corporation*, Order on Reconsideration, 29 FCC Rcd 16249, 16250-51, para. 7 (WTB Broadband Div. 2014) (*Touchtel*).

To obtain standing, a petitioner must show a causal link between the claimed injury and the challenged action, and demonstrate that the claimed injury would be prevented or redressed by the relief requested.⁴⁰ For purposes of standing, an injury must be both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”⁴¹ Because THL’s alleged injury rests on the provision of a service it has not commenced, the prospect of harm here is speculative. THL has not shown how it would be harmed, imminently or otherwise, by an assignment of the partitioned AMTS spectrum to SCRRA, by SCRRA’s related waiver requests, or by grant of SCRRA’s request to modify the regulatory status of the AMTS spectrum for private PTC use. Accordingly, THL lacks standing to challenge the SCRRA Applications.

13. ITL asserts standing to oppose the SCRRA Applications, arguing that it, not MCLM, should have won the Commission’s auction of the AMTS A-Block license, a portion of which MCLM seeks to partition and assign to SCRRA.⁴² ITL’s alleged injury is neither actual nor imminent. Further, ITL’s claim rests on the premise that MCLM lacked the requisite character to be a licensee at the time of the auction. In removing the SCRRA Applications from the MCLM hearing, however, the Commission determined that possible questions regarding MCLM’s fitness to be a Commission licensee are not germane for the limited purpose of processing the SCRRA Applications to enable PTC.⁴³ We therefore find that ITL lacks standing based on its claim of alleged superior spectrum rights because, even if this claim did not involve a purported injury that is neither actual nor imminent, it is founded on allegations regarding MCLM’s character fitness, which are outside the scope of this proceeding.

14. We find that SSF and VSL—which hold adjacent channel AMTS B Block licenses, Stations WQJW656 and WQCP816, in the same geographic market (AMT006) as Station WQGF318—have standing based on their assertion that grant of certain rule waivers requested by SCRRA could impact planned operations on their spectrum.⁴⁴ We also find that ENL—which holds an AMTS Mountain market area (AMT010) B Block license, Station WQCP814, the western border of which abuts the eastern border of two California counties (Riverside and San Bernardino) to be partitioned to SCRRA—has standing based on its assertion that grant of certain rule waivers requested by SCRRA could impact planned operations on its spectrum.⁴⁵

15. In summary, we find that ENL, SSF, and VSL have standing. Accordingly, any reference below to the “Havens Entities” does not confer standing on Mr. Havens, ITL, or THL.

B. Alleged Prejudice

16. We find that there is no evidence that the Havens Entities suffered prejudice by not

⁴⁰ *Wireless Co.*, 10 FCC Rcd at 13235, para. 7; *Touchnet*, 29 FCC Rcd at 16250-51, para. 7.

⁴¹ *Conference Group, LLC v. FCC*, 720 F.3d 957, 962 (D.C. Cir. 2013), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The *Lujan* Court stated that the constitutional minimum of standing requires that the plaintiff must have suffered an “injury in fact,” an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of; the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁴² Havens Petition to Deny at 9.

⁴³ See *MCLM/SCRRA Order*, 29 FCC Rcd at 10883-84, para. 31 (“allowing the SCRRA Applications to be addressed outside the hearing pursuant to Footnote 7 is a tailored response to a narrow and demonstrated need, involves only a limited amount of spectrum in a single geographic area, and is unlikely to undermine the deterrent to licensee misconduct posed by the *Jefferson Radio* policy”).

⁴⁴ Havens Petition to Deny at 8-9 & n.3.

⁴⁵ *Id.* at 38.

having been afforded an additional six to nine weeks to file their Petition to Deny.⁴⁶ The petition exceeds 80 pages (excluding attachments and exhibits) and the Havens Entities later filed numerous pleadings in which they opposed the SCRRA Applications, resulting in the extensive record before us.⁴⁷

17. There is also no support in the record for the Havens Entities' contention that Commission staff "acted with prejudice toward them with respect to their petitions and filings against MCLM and the License [*i.e.*, Station WQGF318] and [the SCRRA] Applications."⁴⁸ The Havens Entities were not excluded from a "secret private hearing" regarding MCLM as they allege.⁴⁹ Rather, Commission staff investigated possible rule violations by MCLM.⁵⁰ That investigation led to the Commission's commencement of the formal hearing regarding MCLM's qualifications,⁵¹ and the Commission granted Mr. Havens and several related entities party status.⁵²

18. The Havens Entities also claim they "have been warned (with threats of adverse action) by both FCC staff and certain professional advisors who know the FCC from the inside, to not challenge the FCC's undefined, almost limitless discretion in the Communications Act"⁵³ The Havens Entities identify no FCC staff member who has threatened them, and cite no facts to support their conclusory accusations. To the extent that the Havens Entities believe they suffered prejudice regarding the Commission's processing of certain Freedom of Information Act (FOIA) requests,⁵⁴ our rules provide that they could have sought review of any determinations with which they disagreed.⁵⁵ Further, to the extent the Havens Entities believe they have been aggrieved by the FRA's handling of a FOIA request,⁵⁶ they may address those concerns with the FRA.

C. MCLM's Character Qualifications

19. The Havens Entities repetitively argue that MCLM lacks the requisite character qualifications to hold, and thus assign, spectrum from Station WQGF318 to SCRRA. They claim MCLM lacks "character and fitness, for repeated willful misrepresentations and rule violations including, but not limited to, its actual control and ownership, its actual officers and directors, its designated entity size . . . , undertaking unlawful transfers of control (including of the License), unlawful operation of AMTS licenses as PMRS . . . , and for maintaining stations that automatically terminated without specific

⁴⁶ *Id.* at 11. On April 22, 2010, one week before petitions to deny were due, the Havens Entities argued they needed more time to prepare their petition. *See* Havens Entities Motion to Extend Pleading Cycle, ULS File No. 0004144435 (filed Apr. 22, 2010). Among other things, the Havens Entities claimed that an employee's work on the petition was hampered by an earthquake in Chile that occurred two months prior to the filing deadline. *Id.* at 8.

⁴⁷ *See supra* note 31.

⁴⁸ Havens Petition to Deny at 11.

⁴⁹ *See id.* at 16 n.10.

⁵⁰ *See, e.g., HDO*, 26 FCC Rcd at 6527-28, paras. 20-22.

⁵¹ *HDO*, 26 FCC Rcd 6520.

⁵² On April 22, 2015, Chief Administrative Law Judge Richard L. Sippel excluded Mr. Havens and several related entities from further participation in the hearing citing their pattern of disruptive conduct, and certified a question concerning Mr. Havens' character qualifications to the Commission. *See Maritime Communications/Land Mobile, LLC*, EB Docket No. 11-71, FCC 15M-14, Memorandum Opinion and Order, 2015 WL 1890837 at *10, paras. 25-26 (ALJ 2015), *petition for reconsideration pending*.

⁵³ Havens Petition to Deny at 71.

⁵⁴ *See id.* at 42 n.23 (FOIA Control No. 2010-379); *id.* at 51 (FOIA Control Nos. 2007-177 and 2007-178); *id.* at 57 n.30; *id.* at 64 n.39 (FOIA Control No. 2007-178); *id.* at 68-69 FOIA Control Nos. 2009-089 and 2010-379).

⁵⁵ *See* 47 CFR §§ 0.461(i) and (j) (procedures for seeking review of Commission FOIA determinations).

⁵⁶ Havens Entities Further Statement at 4.

Commission action for failure to meet the requirements of Section 80.475(a).⁵⁷ In removing the SCRRRA Applications from the MCLM hearing proceeding,⁵⁸ the Commission found that despite possible questions regarding MCLM's character qualifications, it would permit the Bureau's consideration of MCLM's application to assign the partitioned spectrum to SCRRRA, citing the compelling "public interest in permitting the assignment of a spectrum license to SCRRRA to implement a life-saving, positive train control system as required by Congress."⁵⁹ Because we are bound by the Commission's determinations in the *MCLM/SCRRRA Order*,⁶⁰ we need not address the Havens Entities' myriad arguments regarding MCLM's character qualifications to hold and assign spectrum under Station WQGF318 to SCRRRA; arguments that amount to reconsideration of that order.⁶¹

D. Incorporation of Other Pleadings

20. The Havens Entities' attempt to incorporate in their Petition to Deny "all the facts and arguments in their pleadings" in 24 other proceedings, which they denote alphanumerically as proceedings (a)-(h) and (1)-(16), and collectively refer to as "Related Proceedings."⁶² We are not required to scour the labyrinth of the Havens Entities' pleadings in 24 proceedings to discern what, if any, "facts and arguments" may be germane here and we decline the Havens Entities' entreaty to do so.⁶³

21. The Havens Entities broadly argue that the "Related Proceedings" show that MCLM lacks the requisite character to be a Commission licensee.⁶⁴ The Havens Entities also offer what they style as "New Facts 1 to New Facts 12," which appear to be culled from the "Related Proceedings," for the proposition that MCLM lacks fitness to be a Commission licensee and assign spectrum under Station WQGF318 to SCRRRA.⁶⁵ As explained above, by removing the SCRRRA Applications from the MCLM

⁵⁷ Havens Petition to Deny at 1-2.

⁵⁸ *MCLM/SCRRRA Order*, 29 FCC Rcd at 10880, para. 25 ("we conclude that the SCRRRA Applications should be removed from the hearing in order to facilitate SCRRRA's implementation of PTC").

⁵⁹ *Id.* at 10885, para. 33.

⁶⁰ See *Calvary Chapel of Honolulu, Inc. Maka'ainana Broadcasting Company, LTD.*, Memorandum Opinion and Order, 30 FCC Rcd 14910, 14911, para. 4 and n.10 (2015) ("the Bureau is bound by the decisions and guidelines set forth by the Commission and has no authority to alter or depart from Commission precedent").

⁶¹ The Havens Entities also attempt to interject state law claims regarding MCLM's fitness to be a Commission licensee. See, e.g., Havens Petition to Deny at 16-21 (arguing that MCLM does not exist as a legal entity); *id.* at 52 ("MCLM does not exist as a legal entity under corporate law."). Such claims are beyond the scope of this proceeding and we need not address them here.

⁶² See generally *id.* at 39-42; *id.* at 49 n.26 ("Many of the new facts in this Petition [to Deny] . . . are being provided via reference and incorporation of Petitioners' pleadings in other proceedings that are already before the FCC.").

⁶³ See, e.g., *Petition of Core Communications, Inc. for Forbearance From Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14215, para. 13 n.48 (2007) ("the Commission is not obligated to search the record" to determine whether arguments incorporated by reference may be relevant); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969) (an "agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims").

⁶⁴ Havens Petition to Deny at 43-49.

⁶⁵ See generally *id.* at 49-65; *id.* at 52 (New Facts 1, alleging "MCLM does not exist as a legal entity"); *id.* at 53 (New Facts 2, alleging "unauthorized transfer of control"); *id.* at 54-55 (New Facts 3, alleging "disregard for FCC rules and law"); *id.* at 56 (New Facts 4, alleging failure to disclose ownership and control); *id.* at 56 (New Facts 5, alleging same); *id.* at 57 (New Facts 6, alleging unlawful operation); *id.* at 57 (New Facts 7, alleging nonpayment of fees); *id.* at 57 (New Facts 8, alleging lack of candor); *id.* at 58 (New Facts 9, alleging illegal operation); *id.* at 58 (New Facts 10, alleging unlawful transfer of control, and lack of character and fitness); *id.* at 58-64 (New Facts 11, alleging noncompliance with FCC rules and lack of candor); *id.* at 64-65 (New Facts 12, alleging the making of false certifications).

hearing proceeding, the Commission has determined that, despite arguments regarding MCLM's character, it would permit consideration of an application requesting a limited assignment of spectrum to SCRRA to deploy PTC. As such, arguments regarding MCLM's character are beyond the scope of our review of the SCRRA Applications.

E. Part 80 Rule Waiver Requests

22. SCRRA requests waiver of seven Part 80 rules and any other rule provision that we determine to be necessary to enable Metrolink's PTC deployment in the AMTS spectrum band.⁶⁶ Before addressing each waiver request, we discuss the Havens Entities' general arguments opposing waiver relief.

23. The Havens Entities argue that SCRRA seeks to use its AMTS licenses beyond the intent and purpose of the AMTS rules and that a Commission rulemaking on these issues, not waivers, is therefore appropriate.⁶⁷ We find that consideration of SCRRA's requested rule waivers does not require a Commission rulemaking proceeding as the Havens Entities urge. It is well established that the Commission considers waiver requests on a case-by-case basis.⁶⁸ In fact, in 2015, the Bureau waived the same rules to enable Amtrak's acquisition of spectrum from certain of the Havens Entities to deploy PTC on AMTS spectrum.⁶⁹ In this case, we find that a general rulemaking is not required to address waiver requests involving SCRRA's "unique and specific circumstances"⁷⁰ to deploy PTC along defined rail corridors in the Los Angeles Basin.

24. The Havens Entities generally oppose SCRRA's waiver requests arguing that it has not made a "public interest case for PTC,"⁷¹ and that PTC deployment is tantamount to a "guinea-pig experiment."⁷² We disagree. Congress enacted the PTC mandate in the wake of a tragic Metrolink accident in which 25 persons lost their lives; an accident that the NTSB has determined PTC could have prevented.⁷³ In its order removing the SCRRA Applications from the MCLM hearing, the Commission found that "PTC is a potentially transformative technology" that can "save lives, prevent injuries, and avoid extensive property damage."⁷⁴ In May 2016, the NTSB found that PTC could have prevented an Amtrak train derailment in which 8 persons lost their lives, and nearly 200 others were injured (many of them critically).⁷⁵ The public interest benefits of PTC are irrefutable and can be served by grant of the

⁶⁶ See SCRRA Waiver Request. SCRRA initially also requested waiver of Rule Sections 80.102(a), 80.123(d), 80.123(e), 80.123(g), 80.215(h)(5), 80.475(c), and 80.479(c), but has withdrawn its request as to those rules. See Minor Amendment and Second Minor Amendment.

⁶⁷ See Havens Petition to Deny at 33; Reply to Comments at 6-7.

⁶⁸ The Commission has held that waiver requests are best suited to a case-by-case analysis. See, e.g., *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, Report and Order, PS Docket Nos. 11-153 and 10-255, 28 FCC Rcd 7556, 7578, para. 62 (2013).

⁶⁹ *National Railroad Passenger Corporation (d/b/a Amtrak), Request for Waiver of Certain Part 80 Automated Maritime Telecommunications System Rules to Implement Positive Train Control*, Order, 30 FCC Rcd 2038 (WTB MD 2015) (*Amtrak Part 80 Waiver Order*).

⁷⁰ SCRRA Opposition at 5-6.

⁷¹ Havens Petition to Deny at 34.

⁷² Havens Entities Further Statement at 2.

⁷³ See *supra* discussion at paragraph 3.

⁷⁴ *MCLM/SCRRA Order*, 29 FCC Rcd at 10882, para. 29.

⁷⁵ The NTSB found that a PTC system could have prevented a May 12, 2015, accident in Philadelphia, where Amtrak train 188 derailed as it was going 106 miles per hour through a curve subject to a permanent 50 miles per hour speed restriction. NTSB, *Derailed Amtrak Passenger Train 188, Philadelphia, Pennsylvania, May 12,*

(continued....)

waiver requests to implement this life-saving technology.

25. We also reject the Havens Entities claim that grant of the requested rule waivers would undermine Commission spectrum policy.⁷⁶ Rather, SCRRRA's use of AMTS spectrum to deploy PTC will further the Commission's core mandate to "promot[e] safety of life and property through the use of wire and radio communications," embodied in Section 1 of the Communications Act.⁷⁷ As SCRRRA notes, grant of the waivers will promote "intensive use of the AMTS spectrum,"⁷⁸ and is consistent with the Commission's goal of facilitating use of AMTS spectrum for safety purposes.⁷⁹

26. The Havens Entities urge us to deny the SCRRRA Applications and waiver requests, alleging that SCRRRA has not shown it needs AMTS spectrum to deploy PTC,⁸⁰ that the amount of spectrum it seeks to acquire from MCLM to deploy PTC is excessive,⁸¹ and that it should deploy a PTC technology favored by the Havens Entities.⁸² In the *MCLM/SCRRRA Order*, the Commission noted that SCRRRA has executed a temporary lease of 220-222 MHz band spectrum with PTC-220 to deploy PTC, but "this does not provide a long-term solution to its PTC spectrum needs."⁸³ The Commission also found that the freight rails' nationwide use of the 220-222 MHz Band to deploy PTC, coupled with the requirement that PTC systems be interoperable, "makes AMTS spectrum particularly suitable for PTC use."⁸⁴ The waivers SCRRRA requests to deploy PTC on AMTS spectrum will, like those afforded Amtrak,⁸⁵ enable it to comply with the federal PTC mandate. Further, as noted below, the waiver relief we grant today is limited to use of the spectrum for PTC.⁸⁶

27. We now address SCRRRA's request for waiver of the following Part 80 rules to facilitate Metrolink's PTC deployment:

- Section 80.92(a), which requires Part 80 licensees to monitor a frequency prior to transmitting;⁸⁷

(Continued from previous page)

2015, Accident Report, NTSB/RAR-16-02 at vi (2016),
<http://www.nts.gov/investigations/AccidentReports/Pages/RAR1602.aspx>.

⁷⁶ See, e.g., Havens Petition to Deny at 33.

⁷⁷ 47 U.S.C. § 151.

⁷⁸ SCRRRA Opposition at 6. See also SCRRRA Waiver Request at 14.

⁷⁹ See SCRRRA Opposition at 6, citing *Maritel, Inc. and Mobex Network Services, LLC*, Report and Order, 22 FCC Rcd 8971, 8986-87, para. 26 (2007) (*Flexibility Order*), *aff'd*, 25 FCC Rcd 533 (2010), *aff'd*, 26 FCC Rcd 2491 (2011), *review dismissed*, 26 FCC Rcd 16579 (2011).

⁸⁰ Havens Entities Further Statement at 10 & n.11; see also Havens Petition to Deny at 34.

⁸¹ Havens Entities Reply at 8 (citing Metrolink November 9, 2009 Memorandum, Contract No. PO370-10, Item 17 at 2, which notes that SCRRRA is "determining exactly how much spectrum is necessary for its PTC system," that one megahertz may be "more than will be necessary for SCRRRA's short and mid-term PTC needs," and that it "may sell or lease any excess spectrum"). The Metrolink November 9, 2009 Memorandum is attached as Exhibit 1 to the Havens Entities Reply.

⁸² See, e.g., ENL/Havens/SSF Reply at 6 (asserting PTC using TETRA is successful outside the United States and that U.S. railroads "refuse to consider this proven solution"); Havens Entities Further Statement at 6-8 (asserting the railroads cling to a "teddy bear" concept of PTC as a "single technology platform").

⁸³ *MCLM/SCRRRA Order*, 29 FCC Rcd at 10883, para. 30.

⁸⁴ *Id.* at 10884, para. 32.

⁸⁵ See *supra* discussion at paragraph 23.

⁸⁶ See *infra* discussion at paragraph 40.

⁸⁷ 47 CFR § 80.92(a).

- Section 80.105, which requires coast stations to receive calls from ship and aircraft stations;⁸⁸
- Section 80.123(a), which requires AMTS land stations to secure a letter authorizing the land station to communicate with the coast station;⁸⁹
- Section 80.123(b), which requires coast stations to afford priority to marine-originating communications;⁹⁰
- Section 80.123(c), which requires AMTS land stations to use the associated coast station's call sign, followed by a unique numeric or alphabetic unit identifier;⁹¹
- Section 80.123(f), which provides that AMTS land stations may only communicate with public coast stations;⁹² and
- Section 80.385(a)(2), which divides AMTS spectrum into coast (base) station frequencies (217-218 MHz) and ship (mobile) station frequencies (219-220 MHz).⁹³

28. *Waiver Standard.* Section 1.925(b)(3) of the Commission's Rules provides that we may grant a waiver if it is shown that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (ii) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁹⁴ The Commission also may waive a rule, in whole or in part, on its own motion or on petition for good cause.⁹⁵

29. Further, when the Commission amended its rules to permit AMTS stations to provide private correspondence service to units on land, it stated that the following factors would be considered in evaluating requests for waiver of AMTS rules: (a) whether the applicant will provide priority to maritime communications; (b) the distance of a proposed land mobile radio operation from the nearest navigable waterways; (c) the magnitude of divergence sought from specific Part 80 technical requirements; (d) whether alternative spectrum that could accommodate the proposed private land mobile radio (PLMR) or other land mobile radio service is unavailable or unsuitable for that purpose; and (e) whether grant of the waiver would benefit public safety or homeland security (including support of critical infrastructure).⁹⁶

30. *Section 80.92(a).* Section 80.92(a) requires an AMTS station operator to determine that a frequency is not in use before transmitting.⁹⁷ SCRRA states that "because PTC systems must be operated

⁸⁸ 47 CFR § 80.105.

⁸⁹ 47 CFR § 80.123(a).

⁹⁰ 47 CFR § 80.123(b).

⁹¹ 47 CFR § 80.123(c).

⁹² 47 CFR § 80.123(f).

⁹³ 47 CFR § 80.385(a)(2).

⁹⁴ 47 CFR § 1.925(b)(3); *see also WAIT Radio v FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

⁹⁵ 47 CFR § 1.3.

⁹⁶ *See Flexibility Order*, 22 FCC Rcd at 8986-87, para. 26.

⁹⁷ 47 CFR § 80.92(a).

on an exclusive use basis, there is no reason to listen first for nonexistent other transmitters.”⁹⁸ SCRRA explains that the rule is inapplicable to SCRRA’s Time Division Multiple Access (TDMA) PTC technology, which assigns timeslots to users on a repeating basis so there is no time (spectrum capacity) lost listening before transmitting.⁹⁹ In the *Amtrak Part 80 Waiver Order*, the Bureau found that waiving the requirement to monitor before transmitting would “promote the efficient use of AMTS spectrum and serve the public interest by promoting rail safety.”¹⁰⁰ We find that the underlying purpose of Section 80.92(a)’s requirement to listen before transmitting—to avoid interference—would not be served where, as here, there will be no co-channel incumbent licensees, and that grant of the requested waiver would be in the public interest by promoting rail safety and the efficient use of AMTS spectrum.¹⁰¹

31. *Section 80.105 and Section 80.123(b)*. SCRRA requests waiver of the requirements that AMTS licensees receive calls from ship stations (Section 80.105),¹⁰² and that they afford priority to marine communications (Section 80.123(b)).¹⁰³ SCRRA explains that PTC “must be operated on an exclusive-use private land mobile basis, and could not possibly provide service to maritime traffic.”¹⁰⁴ SCRRA states that transmissions from other users would create interference with its PTC system and could cause unplanned stops where “the PTC system interprets the lack of its own signal reception as a lack of movement authority.”¹⁰⁵ The FRA supports the rule waivers requested by SCRRA, stating that they are “required to allow necessary intercommunication between the various PTC system elements,” and that not granting rule waivers “would be detrimental to PTC operation by interrupting critical information flow.”¹⁰⁶ The Havens Entities oppose the requested rule waivers, claiming SCRRA has failed to show good reason why they should be waived in one of the largest port areas of the United States.¹⁰⁷

32. In the *Amtrak Part 80 Waiver Order*, the Bureau waived the requirement to afford priority to marine communications to enable PTC, finding that “use of the AMTS frequencies will not jeopardize the maritime community’s ability to meet its operational, safety, and security communications needs.”¹⁰⁸ SCRRA states that waiver of the marine-priority requirement will not harm maritime users because there are numerous other licensees in the relevant area available to meet marine communications needs.¹⁰⁹ SCRRA also notes that maritime users are increasingly using cellular and satellite telephone service to meet their communications needs and that the coastal area of the proposed partitioned license area is well served by cellular and satellite service providers.¹¹⁰

33. In the *Amtrak Part 80 Waiver Order*, the Bureau also waived the Section 80.105 requirement that coast stations receive calls from ship stations, finding that “permitting Amtrak’s stations

⁹⁸ SCRRA Waiver Request at 7 n.18.

⁹⁹ *Id.*

¹⁰⁰ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2041, para. 11.

¹⁰¹ 47 CFR § 1.925(b)(3)(i).

¹⁰² 47 CFR § 80.105.

¹⁰³ 47 CFR § 80.123(b).

¹⁰⁴ SCRRA Waiver Request at 6.

¹⁰⁵ *Id.*

¹⁰⁶ FRA Letter at 2.

¹⁰⁷ Havens Petition to Deny at 34.

¹⁰⁸ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2041, para. 11.

¹⁰⁹ SCRRA Waiver Request 9-12. SCRRA states that it provided a copy of the SCRRA Applications to the United States Coast Guard (USCG) and that the USCG had no objection. *Id.* at 10 n.23.

¹¹⁰ *Id.* at 12.

to communicate with stations other than public coast and ship stations will promote the efficient use of AMTS spectrum and serve the public interest by improving safety in railroad operations.”¹¹¹ We find that waiver of Sections 80.105 and 80.123(b) to enable SCRRRA’s PTC deployment will not jeopardize the maritime community’s ability to meet its operational, safety, and security communications needs. We also find that in light of the unique circumstances of SCRRRA’s PTC deployment, application of Sections 80.105 and 80.123(b) to its PTC operations would be contrary to the public interest in rail safety and accordingly waive these rules.¹¹²

34. *Section 80.123(a)*. SCRRRA seeks a waiver of the requirement that AMTS land stations secure a letter authorizing the land station to communicate with the coast station (Section 80.123(a)),¹¹³ which enables authorities to verify that a unit on land is authorized to operate on AMTS spectrum.¹¹⁴ SCRRRA’s system is configured to transmit only data, and its railroad operations take place in limited locations where the responsible party is easily identifiable. We previously granted such a request with respect to an electric utility’s fixed data system,¹¹⁵ and for Amtrak’s PTC deployment on AMTS spectrum.¹¹⁶ We find that in light of the unique circumstances SCRRRA faces in complying with the federal PTC mandate, application of Section 80.123(a) to its operations is unnecessary and would be unduly burdensome and therefore waive this rule.¹¹⁷

35. *Section 80.123(c)*. SCRRRA seeks waiver of Section 80.123(c), which provides that a coast station may communicate with a land station only if the land station uses the coast station’s call sign.¹¹⁸ SCRRRA states that compliance with this rule would be unduly burdensome and is unnecessary for its operation of an exclusive use, land-based private PTC system.¹¹⁹ We note that in 2000, the Commission forbore from requiring AMTS licensees to comply with the general AMTS station identification requirement.¹²⁰ We clarify here that the Commission’s forbearance from the general AMTS station identification requirement (47 CFR § 80.102) relieves AMTS licensees from compliance with the station identification requirement of Section 80.123(c) because AMTS land stations are no longer required to identify themselves. We therefore conclude that waiver of Section 80.123(c) is unnecessary.

36. *Section 80.123(f)*. SCRRRA seeks waiver of the requirement that AMTS land stations only communicate with public coast stations (Section 80.123(f)),¹²¹ explaining that such an operational standard is unnecessary for a private, internal-use only system.¹²² We agree and note that the Bureau

¹¹¹ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2042, para. 13.

¹¹² 47 CFR § 1.925(b)(3)(ii). *See also County of Silverbow, Montana*, Order, 24 FCC Rcd 12547, 12565, para. 41 (PSHSB PD 2009) (*Silverbow Order*) (waiving Sections 80.105 and 80.106 to permit use of VHF Public Coast station frequencies in a Public Safety PLMR system).

¹¹³ 47 CFR § 80.123(a).

¹¹⁴ SCRRRA Waiver Request at 1.

¹¹⁵ *See PHI Service Co.*, Order, 29 FCC Rcd 8176, 8179, para. 9 (WTB MD 2014).

¹¹⁶ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2042, para. 12.

¹¹⁷ 47 CFR § 1.925(b)(3)(ii).

¹¹⁸ 47 CFR § 80.123(c) (“Land station identification shall consist of the associated public coast station’s call sign, followed by a unique numeric or alphabetic unit identifier.”).

¹¹⁹ SCRRRA Waiver Request at 6 n.16.

¹²⁰ 47 CFR § 80.102; *Regionet Wireless License, LLC*, Order, 15 FCC Rcd 16119, 16119, para. 1 (2000) (“AMTS stations are no longer required to identify themselves, by giving their call sign, in English, at the beginning and end of each communication with any other station and at fifteen minute intervals when transmission is sustained for more than fifteen minutes.”).

¹²¹ 47 CFR § 80.123(f).

¹²² SCRRRA Waiver Request at 6 n.17.

granted Amtrak a waiver of this requirement to enable its PTC deployment on AMTS spectrum.¹²³ We find that in light of the unique circumstances SCRRA faces in complying with the federal PTC mandate, application of Section 80.123(f) to its PTC operations would be contrary to the public interest in rail safety and accordingly waive this rule.¹²⁴

37. *Section 80.385(a)(2)*. SCRRA requests waiver of Section 80.385(a)(2),¹²⁵ which divides the AMTS spectrum band into coast (base) station frequencies (217-218 MHz) and ship (mobile) station frequencies (219-220 MHz). SCRRA explains that since its PTC system will use TDMA transmit/receive time slot separation, it must allow all three types of PTC stations (base, mobile, and wayside) to transmit on both the base and mobile station frequencies.¹²⁶ We note that when the Bureau granted Amtrak a waiver of this requirement to deploy PTC on AMTS spectrum, it emphasized that Amtrak would operate under the antenna height and power levels permitted for AMTS stations and the limited geographic area of Amtrak's rail operations.¹²⁷ Because SCRRA's PTC operations will comply with the AMTS antenna height and power level rules and because its rail lines likewise span a limited geographic area, we conclude that a waiver of Section 80.385(a)(2) is warranted. We also find that in light of the unique circumstances SCRRA faces in complying with the federal PTC mandate, strict application of Section 80.385(a)(2) to its PTC operations would be contrary to the public interest and accordingly waive this rule.¹²⁸

38. *Section 80.106*. In its Waiver Request, SCRRA also requests "waiver of any additional rule provisions which the Commission may determine to be necessary for the proposed [PTC] operations."¹²⁹ SCRRA furthermore states that PTC "must be operated on an exclusive-use private land mobile basis, and could not possibly provide service to maritime traffic."¹³⁰ Based on our review of the record before us, we find that waiver of Section 80.106¹³¹—which requires an AMTS public coast station to receive communications from mobile stations (*i.e.*, ship and aircraft stations at sea) and to transmit communications delivered to it which are directed to mobile stations—is warranted.

39. In the *Amtrak Part 80 Waiver Order*, the Bureau concurrently waived Section 80.106 to enable Amtrak's PTC deployment when it waived the requirement, under Section 80.105, that AMTS coast stations acknowledge and receive calls from mobile stations.¹³² Consistent with the *Amtrak Part 80 Waiver Order*, we find that waiving Section 80.106 here will promote the efficient use of AMTS spectrum and serve the public interest by improving safety in railroad operations, without jeopardizing the maritime community's ability to meet its operational, safety, and security communications needs.¹³³ We also find that in light of the unique circumstances of SCRRA's PTC deployment, application of Section 80.106 to its PTC operations would be contrary to the public interest in rail safety and therefore waive

¹²³ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2042, para. 13.

¹²⁴ 47 CFR § 1.925(b)(3)(ii).

¹²⁵ 47 CFR § 80.385(a)(2).

¹²⁶ SCRRA Waiver Request at 9.

¹²⁷ *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2042-43, para. 14.

¹²⁸ 47 CFR § 1.925(b)(3)(ii).

¹²⁹ SCRRA Waiver Request at 1-2.

¹³⁰ *Id.* at 6.

¹³¹ 47 CFR § 80.106.

¹³² *Amtrak Part 80 Waiver Order*, 30 FCC Rcd at 2042, para. 13.

¹³³ *Id.*

this rule.¹³⁴

40. In addition to the reasons discussed above for granting SCRRA a waiver of certain AMTS rules to facilitate its compliance with the federal PTC mandate, we also find good cause under Section 1.3 of the Commission's rules to waive these rules,¹³⁵ because doing so will serve the public interest in commuter rail safety in the greater Los Angeles area.¹³⁶ We emphasize that the waiver relief we grant today will only apply to use of the AMTS spectrum to deploy PTC in defined rail corridors, thereby limiting the area of potential interference. If SCRRA assigns, partitions, disaggregates, or leases any spectrum it acquires from MCLM to a third party, the waivers would only apply if that spectrum is used for PTC.

F. Reclassification of AMTS Spectrum

41. For the reasons that follow, we grant MCLM's application to modify the regulatory status of the AMTS spectrum it proposes to assign to SCRRA and thereby enable SCRRA's private PTC use of that spectrum.¹³⁷

42. AMTS stations are presumptively regulated as a commercial mobile radio service (CMRS).¹³⁸ Section 20.9(b) of the Commission's rules provides that an AMTS applicant or licensee that wishes to provide service on a private mobile radio service (PMRS)¹³⁹ basis, such as SCRRA, can overcome this presumption by certifying that it will offer service on a PMRS basis.¹⁴⁰ The certification must describe the proposed service sufficiently to demonstrate that it is not within the definition of CMRS under Section 20.3 of the Commission's rules.¹⁴¹ Applications requesting to use AMTS spectrum to offer service on a PMRS basis must be placed on public notice by the Commission;¹⁴² a petition to deny such an application must contain specific allegations of fact to show that the applicant's request does not rebut the CMRS presumption.¹⁴³

43. MCLM's Modification Application was placed on public notice,¹⁴⁴ and both MCLM and SCRRA filed Section 20.9(b) Certifications. In its certification, MCLM states that to accommodate SCRRA's PTC deployment, it will provide no further CMRS in the license area to be assigned to SCRRA.¹⁴⁵ MCLM also states that it has notified its customers, who are on month-to-month contracts, of

¹³⁴ 47 CFR § 1.925(b)(3)(ii). *See also Silverbow Order*, 24 FCC Rcd at 12565, para. 41 (waiving Sections 80.105 and 80.106 to permit use of VHF Public Coast station frequencies in a Public Safety PLMR system).

¹³⁵ This includes all rules discussed above with the exception of 47 CFR § 80.123(c), which does not require a waiver. *See supra* discussion at paragraph 35.

¹³⁶ 47 CFR § 1.3.

¹³⁷ SCRRA Public Interest Statement at 1.

¹³⁸ 47 CFR § 20.9(a)(5). CMRS is defined as a mobile service that is (1) provided for profit, (2) interconnected to the public switched network, and (3) either publically available or effectively available to a substantial portion of the public. 47 CFR § 20.3.

¹³⁹ PMRS is defined as a mobile service that is neither a CMRS nor the functional equivalent of a service that meets the definition of CMRS. 47 CFR § 20.3.

¹⁴⁰ 47 CFR § 20.9(b)(1).

¹⁴¹ *Id.* *See also* 47 CFR § 20.3 (CMRS definition).

¹⁴² 47 CFR § 20.9(b)(1).

¹⁴³ 47 CFR § 20.9(b)(2).

¹⁴⁴ *See supra* note 18, *MCLM/SCRRA Public Notice*.

¹⁴⁵ Certification Pursuant to Section 20.9(b), FCC File No. 0004153701 at 1 (filed Mar. 4, 2010).

its intent to terminate service to enable SCRRA's PTC deployment.¹⁴⁶ MCLM states that "[u]pon grant of the partition to SCRRA, [it] will take down all of its radio facilities in the area,"¹⁴⁷ and upon termination of service, that it will not operate an AMTS service for profit.¹⁴⁸ In their Petition to Deny, the Havens Entities argue that MCLM's Section 20.9(b) Certification should be "dismissed or denied," claiming that MCLM lacks the required character to be a Commission licensee.¹⁴⁹ As explained above, because the Commission removed the SCRRA Applications from the ambit of the MCLM hearing, such character allegations are beyond the scope of this proceeding.¹⁵⁰ The Havens Entities moreover do not address whether MCLM has rebutted the CMRS presumption. We find that because MCLM will terminate any remaining CMRS before completing the spectrum assignment to SCRRA, MCLM has overcome the presumption for the limited spectrum at issue.¹⁵¹

44. In SCRRA's Section 20.9(b) Certification, it states that its "PTC service cannot and will not meet the definition of CMRS because 1) PTC transmissions will not be available to the public or to classes of the public, 2) PTC transmissions will not be interconnected, and 3) the PTC radio transmission service will not be provided for profit."¹⁵² SCRRA explains that to provide PTC, it will be unable to provide CMRS to maritime customers or be interconnected with the public switched network, that such transmissions to outside users would serve no purpose, and that any transmissions from outside users would create interference, triggering unplanned, repeated interruptions to its commuter rail service.¹⁵³

45. The Havens Entities fail to address whether SCRRA's proposed PTC service is a CMRS.¹⁵⁴ Instead, they allege that SCRRA's Section 20.9(b) Certification is infirm, arguing that an internal SCRRA memorandum indicates that SCRRA will not require all of the spectrum it seeks to acquire from MCLM to implement PTC.¹⁵⁵ The Havens Entities misconstrue the import of the SCRRA memorandum, which demonstrates that SCRRA was evaluating the quantity of spectrum required to implement PTC and, that if it acquired surplus spectrum, it might sell or lease that spectrum to a third party.¹⁵⁶ We also note that, in its full context, the memorandum provides no support for the Havens Entities' allegations that SCRRA demonstrated a lack of candor before the Commission.¹⁵⁷

46. The record before us demonstrates that SCRRA intends to use the spectrum it seeks to acquire from MCLM for PTC deployment on non-commercial, private mobile radio basis.¹⁵⁸ We find that

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1-2.

¹⁴⁹ Havens Petition to Deny at 38-39. These arguments include the assertion that MCLM's petitions to deny unrelated Havens Entities' Section 20.9(b) applications in a separate, unrelated proceeding demonstrates a lack of candor on MCLM's part. *Id.*

¹⁵⁰ See *supra* paragraph 19.

¹⁵¹ 47 CFR § 20.9(b)(2).

¹⁵² Certification Pursuant to Section 20.9(b), FCC File No. 0004144435 at 2 (filed Mar. 3, 2010) (SCRRA Section 20.9(b) Certification), *citing to* 47 CFR § 20.3.

¹⁵³ SCRRA Section 20.9(b) Certification at 1-2. SCRRA states that trains will automatically stop when the PTC system interprets the lack of its own signal reception as a lack of movement authority. *Id.* at 2.

¹⁵⁴ See 47 CFR § 20.9(b)(2).

¹⁵⁵ ITL/THL/VSL Reply at 23.

¹⁵⁶ See *supra* note 81.

¹⁵⁷ See ITL/THL/VSL Reply at 23.

¹⁵⁸ See *Applications of Verde Systems, LLC*, Order, 25 FCC Rcd 9166, 9170, para. 9 (WTB MD 2010) (finding that statement describing intent to operate on a private, internal basis without interconnection to the public switched

(continued....)

SCRRA, given its planned use of the AMTS spectrum, has overcome the CMRS regulatory classification presumption,¹⁵⁹ and hereby grant the Modification Application.

IV. CONCLUSION AND ORDERING CLAUSES

47. For the reasons above, we conclude that grant of the SCRRA Applications and related waiver requests will further the vital public interest in rail safety and is consistent with the federal PTC mandate, the Commission's determinations in the *MCLM/SCRRA Order*, and relevant Commission rules.

48. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.3 and 1.925(b)(3) of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.925(b)(3), that applications under ULS File Nos. 0004153701 and 0004144435 ARE GRANTED to the extent discussed above.

49. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the Petition to Deny, and in the Alternative Section 1.41 Request, filed by Warren Havens, Environmental LLC, Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and Verde Systems LLC on April 28, 2010, ULS File Nos. 0004153701 and 0004144435, IS DENIED. All other pleadings filed by Warren Havens and any of these five associated entities of which he is President under WT Docket 10-83, ULS File No. 0004153701, or ULS File No. 0004144435 are DISMISSED AS MOOT.

50. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

(Continued from previous page) _____
network sufficiently demonstrates that operations would not be within the definition of a CMRS.) The Commission has stated that when weighing the sufficiency of Section 20.9(b) certifications, it would "rely primarily upon applicants' representations regarding their regulatory status." *Id.* at 9169, para. 6 n.24, citing *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19879, para. 54 (1998).

¹⁵⁹ 47 CFR § 20.9(b)(1).

EXHIBIT 4

The below first page shows the court stamp on the document. The extensive exhibits to the below document are not included here.

PREVIEW ONLY

ENTIRE DOCUMENT AVAILABLE FOR PURCHASE



MPTON LLP

111483
173

FILED
ALAMEDA COUNTY

SEP 26 2016

CLERK OF THE SUPERIOR COURT

By *Jamie Thomas*
JAMIE THOMAS, Deputy

com
com

OF THE STATE OF CALIFORNIA

TY OF ALAMEDA

TED JURISDICTION

Case No. 2002-070640

**STATEMENT OF RECEIVER RE
STATUS OF LEONG PARTNERSHIP
BANKRUPTCY AND FURTHER FCC
FILINGS BY DEFENDANT WARREN
HAVENS;**

ENT **DECLARATION OF DAVID A.
DEGROOT**

UM Date: September 27, 2016
2, Time: 3:45 p.m.
id Dept.: 24

RESERVATION NO. R-1775726

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
GERALDINE A. FREEMAN, Cal. Bar No. 111483
3 DAVID A. DEGROOT, Cal. Bar No. 168073
Four Embarcadero Center, 17th Floor
4 San Francisco, California 94111-4109
Telephone: 415.434.9100
5 Facsimile: 415.434.3947
Email: gfreeman@sheppardmullin.com
6 ddegroot@sheppardmullin.com

7 Attorneys for Receiver
SUSAN L. UECKER
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 UNLIMITED JURISDICTION

12 ARNOLD LEONG,

13 Plaintiff,

14 v.

15 WARREN HAVENS, an individual,
ENVIRONMENTEL LLC,
16 ENVIRONMENTEL-2 LLC, INTELLIGENT
TRANSPORTATION & MONITORING
17 WIRELESS LLC, V2G LLC, ATLIS
WIRELESS LLC, SKYBRIDGE SPECTRUM
18 FOUNDATION, VERDE SYSTEMS LLC,
TELESAURUS HOLDINGS GB, LLC, and
19 DOES 1 through 30, inclusive,

20 Defendants.

Case No. 2002-070640

**STATEMENT OF RECEIVER RE
STATUS OF LEONG PARTNERSHIP
BANKRUPTCY AND FURTHER FCC
FILINGS BY DEFENDANT WARREN
HAVENS;**

**DECLARATION OF DAVID A.
DEGROOT**

Date: September 27, 2016
Time: 3:45 p.m.
Dept.: 24

RESERVATION NO. R-1775726

1 **I. SUMMARY OF SEPTEMBER 22 BANKRUPTCY COURT HEARING**

2 On September 22, 2016, the United States Bankruptcy Court for the Northern
3 District of California heard the motion to dismiss of Arnold Leong (“Leong”), plaintiff in this
4 matter. The bankruptcy court denied Leong’s motion to dismiss. Although the court accepted that
5 there were only two creditors petitioning for the involuntary bankruptcy of the Leong Partnership,
6 it could not find that there were more than twelve creditors as argued by Leong. The court stated
7 that it could not consider facts outside of the pleadings on a motion to dismiss and the pleadings
8 were inconclusive as to the number of creditors. The court declined to consider the argument that
9 there was no Leong Partnership as being beyond the motion. DeGroot Decl., ¶ 2 and Ex. 1 at 7-10.

10 Petitioning creditors Warren Havens (“Havens”), defendant here, and Polaris PNT
11 PBC (“Polaris”), through counsel, raised the issue of obtaining an order for relief. The Court
12 indicated that no order for relief would issue without a written motion.¹ DeGroot Decl., ¶¶ 4, 5.

13 **II. SUMMARY OF LATEST FCC FILINGS BY HAVENS**

14 Havens submitted two FCC filings over this past weekend. They are:

15 - Havens’ filing on September 24, 2016, with the FCC, referring to a series of
16 pending matters, including matter nos. 11-71 and 13-85. DeGroot Decl., Ex. 2. This filing refers to
17 a September 19, 2016 meeting Havens had with FCC staff; and

18 - Havens’ filing on September 25, 2016, with the FCC, referring to the same
19 matters. DeGroot Decl., Ex. 3.

20 The Receiver provides these documents for the Court’s information. The Receiver
21 believes that Havens’ continuing interactions with the FCC on matters related to the Receivership
22 Entities and their FCC Licenses violate this Court’s orders. The Receiver also believes that

23 ¹ The relevant discussion between Havens’ bankruptcy counsel and Judge Novack of the
24 bankruptcy court was as follows:

25 “Mr. Kim: We had intended to the extent that the motion [to dismiss] was denied to file a
26 request for the entry of an order for relief. We think the law plainly states that the stay does
27 go into effect when the order is entered. So, to the extent that some sort of hybrid order
28 being requested where there is no stay proposed.

 Court: I am not entertaining any order or any request orally today. If the parties want to file
a motion, they may, for whatever relief they think they’re entitled to.” DeGroot Decl., ¶ 5.

1 Havens will not cease these efforts, just as he has not stopped attempting to participate in the 11-
2 71 proceeding in spite of Administrative Law Judge Sippel's order precluding him and the entities
3 from such involvement.

4 **III. CURRENT STATUS REGARDING BANKRUPTCY**

5 The Receiver believes that the subject FCC Licenses are not property of the estate
6 of any alleged Leong Partnership; they are the property of receivership entities Verde and
7 Skybridge.⁴ She provided authority in her opening brief in support of the proposed sale to Alstom,
8 at 6-7, to which Havens provided no contrary authority. Therefore, the involuntary bankruptcy
9 petition of Havens and Polaris has no effect on this Court's ability to rule on pending motions and
10 to approve future asset sales.

11 Havens has not provided any authority supporting his theory that this matter is
12 stayed because of his involuntary bankruptcy petition against the Leong Partnership. The
13 bankruptcy court declined to issue any order for relief on September 22. Havens is free to seek an
14 order of the bankruptcy court to seek a stay of this action, even though the Receiver strongly
15 believes that such an action would fail for its lack of merit.

16 Havens has a fundamental misconception of what an involuntary bankruptcy is.
17 Unlike a debtor filing a bankruptcy petition, where the debtor both subjects itself to the
18 jurisdiction of the bankruptcy court and gains protection of the automatic stay, the subject of an
19 involuntary bankruptcy petition is generally free to operate its business unless otherwise ordered
20 by the bankruptcy court. The period between the filing of the involuntary petition and the
21 bankruptcy court's decision on whether or not the subject of the petition should be forced into
22 bankruptcy is known as the "gap period." One treatise author describes that period as follows:

23 The debtor's interest during the gap period is to be allowed to
24 continue with business as usual. Prior to the entry of an order for
25 relief by the court, nothing has been proven; the mere fact that the
petitioning creditors have alleged that this debtor should be in
bankruptcy does not make it so. The default rule during the gap

26
27 ⁴ The Receiver notes that Skybridge is not alleged by Havens to be part of the Leong
28 Partnership, which Havens could not allege while purporting to have Skybridge be one of
the petitioning creditors.

1 period is in the debtor's favor: the debtor may continue to operate its
2 business without the need for court authorization, and the debtor
3 may use, acquire, or dispose of property freely, as if the case had not
4 been commenced. [11 U.S.C.] § 303(f). The rules in [11 U.S.C.]
§ 363 limiting the ability of the trustee (or the debtor in possession)
to use, sell, or lease property of the bankruptcy estate do not apply
during the gap period.

5 Charles Tabb, *Law of Bankruptcy*, § 2.10 at 159 (West 2013).

6 Here, Havens seeks to bring the receivership to a halt with his involuntary
7 bankruptcy petition against the "Leong Partnership." There is no stay against this non-existent
8 debtor until Havens convinces the bankruptcy court to issue one. If Havens wants such a stay, he
9 has to get it. The Receiver submits that this Court need not give him a *de facto* stay by declining to
10 rule on pending motions until the bankruptcy case is dismissed.⁵

11 The Receiver also notes that the Receivership needs to consummate some asset
12 sales in order to pay expenses and creditors. If Havens had not paid himself \$1.25 million from the
13 entities on May 26, 2015, such sales would not be as critical to the Receivership as they now are.

14 Dated: September 26, 2016

15 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

16
17 By /s/ David A. DeGroot
18 DAVID A. DeGROOT
19 Attorneys for Receiver
20 SUSAN L. UECKER
21
22
23
24
25
26

27 ⁵ The Receiver also notes that the proposed Alstom sale is subject to a 30-day public notice
28 period before the FCC can approve any transfer. Thus, Havens has plenty of time to seek
relief in bankruptcy court if he chooses to do so.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2

3
4
5
6

7
8
9
10
11
12
13
14
15

16
17
18
19
20

21
22
23
24

25

26

27

1 Mr. Kim: We had intended to the extent that the motion [to dismiss] was denied to file a
2 request for the entry of an order for relief. We think the law plainly states that the stay does
3 go into effect when the order is entered. So, to the extent that some sort of hybrid order
being requested where there is no stay proposed.

4 The Court: I am not entertaining any order or any request orally today. If the parties want
5 to file a motion, they may, for whatever relief they think they're entitled to.

6 6. A true and correct copy of an FCC filing by Havens and Polaris dated
7 September 24, 2016 is attached hereto as Exhibit 2. A true and correct copy of an FCC filing by
8 Havens and Polaris dated September 25, 2016, with one long duplicate exhibit eliminated, is
9 attached hereto as Exhibit 3.

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct. Executed on September 26, 2016, at San Francisco, California.

12
13 /s/ David A. DeGroot

14 David A. DeGroot
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 5

From: David DeGroot [mailto:DDeGroot@sheppardmullin.com]

Sent: Monday, October 17, 2016 4:30 PM

To: Dept. 24, Superior Court (dept24@alameda.courts.ca.gov) <dept24@alameda.courts.ca.gov>

Cc: Downs, Andrew <andy.downs@bullivant.com>; Norris, Todd <Todd.Norris@bullivant.com>; David DeGroot <DDeGroot@sheppardmullin.com>; James Robinson <james@scklegal.com>; Paul Kirsch <paul@scklegal.com>; Richard Osman <rosman@bfesf.com>

Subject: Leong v. Havens - case no. 2002-070640 - reservation requests for Nov. 15 and Nov. 22

Dear Mr. Bir,

I have the following reservation requests for the Receiver in the above-referenced action:

For Nov. 15, 2016, I request three numbers: one for a motion to approve settlement with PSE, one for a motion to seal re that motion; and one for a motion to approve the Receiver's report, account, and fee request.

For Nov. 22, 2016, I request four numbers: three for requests to approve sales of estate property and one for a motion to seal. (Note that each of the sale motions will be the subject of the motion to seal. If there are six slots available that day, it may be easier to handle the filing by using six reservation numbers instead of four).

Please let me know if you have availability on these dates.

Thanks and best regards,
David

David DeGroot

415.774.3230 | direct

415.403.6062 | direct fax

DDeGroot@sheppardmullin.com | [Bio](#)

SheppardMullin

Sheppard Mullin Richter & Hampton LLP

Four Embarcadero Center, 17th Floor

San Francisco, CA 94111-4109

415.434.9100 | main

www.sheppardmullin.com

EXHIBIT 6



Andrew B. Downs, SBN 111435
 C. Todd Norris, SBN 181337
 Norman J. Ronneberg, Jr., SBN 68233
 BULLIVANT HOUSER BAILEY PC
 235 Pine Street, Suite 1500
 San Francisco, California 94104-2752
 Telephone: 415.352.2700
 Facsimile: 415.352.2701
 E-Mail: andy.downs@bullivant.com
 todd.norris@bullivant.com
 norman.ronneberg@bullivant.com

**FILED
 ALAMEDA COUNTY**

SEP 14 2016

CLERK OF THE SUPERIOR COURT

By Sue Pester Deputy

Redacted Version Filed Conditionally

Under Seal

Attorneys for Defendant
 WARREN HAVENS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

BY FAX

ARNOLD LEONG,

Plaintiff,

v.

WARREN HAVENS, et al.

Defendants.

Case No.: 2002-070640

**DEFENDANT WARREN HAVENS'
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN OPPOSITION TO
 RECEIVER'S MOTION FOR AN ORDER
 APPROVING SALE AND LEASE OF
 WIRELESS SPECTRUM ASSETS TO
 ALSTOM SIGNALING OPERATION, LLC**

DATE: September 27, 2016

TIME: 3:45 p.m.

DEPT: 24 (Hon. Frank Roesch)

RESERVATION: R-1775726

**I. GRANTING THIS MOTION WOULD VIOLATE THE
 BANKRUPTCY CODE'S AUTOMATIC STAY**

As this court is aware the Leong-alleged oral partnership (upon which Leong premised his interests in the receivership entities) is now the subject of an involuntary bankruptcy. Because Leong claims an interest in the spectrum that is the subject of the instant motion through an alleged partnership that has been placed into an involuntary bankruptcy, this motion is subject to the Bankruptcy Code's automatic stay, and may not be acted upon by this Court, pending a resolution of the bankruptcy or relief from the automatic stay, which can only be granted by the bankruptcy court. Neither Leong nor the Receiver, or any other party, has sought relief from the automatic stay.

- 1 -

OPPOSITION TO RECEIVER'S MOTION FOR AN ORDER APPROVING SALE AND LEASE OF WIRELESS SPECTRUM ASSETS TO ALSTROM SIGNALING OPERATION, LLC

1
2 **II. THE RECEIVER'S PROPOSED AGREEMENT WITH**
3 **ALSTOM SUFFERS FROM FATAL DEFECTS AND MUST**
4 **NOT BE APPROVED**

5 Putting aside the fact that the Court is prohibited by the Bankruptcy Code's automatic
6 stay from acting on this motion, were the court to consider the motion, it would have to deny it.
7 This is for the simple reason that the proposed agreement omits entire schedules, is otherwise
8 incomplete, and even if complete, would still suffer from multiple fatal defects. Further
9 demonstrating the Receiver's inability to competently market and sell the spectrum at issue is
10 the proposed "Spectrum Purchase Agreement" (hereinafter "the SPA" or "Agreement"),
11 attached as Exhibit 2 to the Declaration of Brian D. Weimer. [REDACTED]

12 [REDACTED]
13 Incredibly, the SPA entirely omits any [REDACTED] as well as any other disclosure
14 schedules. The disclosure schedules simply don't exist. Moreover, if [REDACTED] did exist, it
15 is obvious that [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 As a result of Leong's alleged oral partnership and alleged "co-control" of the subject
21 licenses, MCLM has asked the FCC to investigate the possibility of bidding fraud in obtaining
22 the subject licenses.¹ Were the FCC to issue an HDO in response to MCLM's request [REDACTED]

23 [REDACTED] Paragraph 9.1 of the SPA
24 requires [REDACTED]
25 [REDACTED]

26
27 ¹ *Maritime's Comments on the Receiver's Petition to Stay or Hold in Abeyance*, filed by
28 Maritime Communications/Land Mobile LLC ("MCLM"), on March 31, 2016, in Docket No. 11-71 regarding the Receiver's Petition to Stay.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 In its current already executed form, VSL and Skybridge stand [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 All that is left is for [REDACTED]

8 [REDACTED] Havens will not further detail in
9 public court filings the Receiver's missteps here. Suffice to say, it is difficult to imagine that the
10 Receiver did not intentionally subject VSL and Skybridge [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 Havens also objects to the proposed "Long Term De Facto Transfer Lease," attached as
19 Exhibit 3 to the Weimer Declaration because it provides for the sale of the subject spectrum to
20 Alstom for [REDACTED] in the event Lessors seek to assign, transfer or "shift
21 ownership or control of the FCC Licenses" to a third party. There is no justification shown in
22 the documents for such an unconscionably low price or transaction. Moreover, paragraph 12
23 (page 10) purports to provide for an "Option to Purchase Leased Spectrum," but then fails to
24 provide such an option, creating a significant ambiguity in the document.

25 In addition to missing [REDACTED] the SPA suffers from additional glaring
26 deficiencies:

27 [REDACTED]
28 [REDACTED] However, the agreement fails to mention
Leong's asserted claims, which if true, would be an type of
undisclosed lien.

- 1 • [REDACTED] no [REDACTED] which is referenced in
2 [REDACTED] Without this schedule, the SPA remains
incomplete.
- 3 • T [REDACTED]
4 [REDACTED] but
5 Certificates of Service do not provide that power and
authority.
- 6 • The SPA's [REDACTED] fails to state that Havens has claims,
7 including that he is the majority owner of Verde and the
8 only controlling party in Skybridge, or that he is appealing
the state court's receivership order, and that Skybridge is
appealing the dismissal of its bankruptcy case in Delaware.
- 9 • The SPA's [REDACTED] fails to mention that Skybridge
10 and Verde licenses are pending renewal and that
11 Skybridge's license is also pending either FCC acceptance
of its construction notification or grant of its extension
request.
- 12 • The SPA's [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Thus, the Receiver's motion and the sale contract submitted with it, and the other
17 contracts which are referred to in the sale contract and are related to it, are fatally defective.
18 The Court cannot grant the Receiver's motion to approve a contract that is incomplete, and
19 where Havens does not have those materials and thus does not have the ability or opportunity to
20 properly contest or comment on the contract's missing components. The Receiver is wasting
21 Havens' time and money on these matters by presenting incomplete information, prematurely
22 seeking the court's approval, and not being cooperative and candid with Havens before filing
23 her motion. If the Receiver is pursuing a deal that is "nearly identical" to what Havens
24 previously negotiated, she should reasonably want to get Mr. Havens' comments and input,
25 prior to filing her motion, especially where Mr. Havens previously informed her that he would
26 not oppose the Alstom deal if it was materially the same as the deal he had negotiated. The
27 Court should get another Receiver at minimum, such as the former FCC Commissioner that
28 Havens recommended.

III. THE RECEIVER'S CONTINUING REFUSAL TO

- 4 -

OPPOSITION TO RECEIVER'S MOTION FOR AN ORDER APPROVING SALE AND LEASE OF WIRELESS
SPECTRUM ASSETS TO ALSTROM SIGNALING OPERATION, LLC

1 **PROVIDE MATERIAL INFORMATION TO HAVENS**

2 This motion, like others before it, could have been avoided if the Receiver would only
3 follow the court's instructions by providing Havens with material information necessary for his
4 input on the Receiver's proposed transactions and other activities.

5 This is the second time Receiver has withheld relevant information concerning this
6 proposed deal. The first time, instead of providing Havens with the fatally flawed document she
7 now seeks approval of, the Receiver provided a mere thumbnail sketch/summary of the
8 proposed deal, leaving out most of the material information that would have allowed Havens to
9 evaluate the proposal. Havens explained in great detail in his motion to terminate the
10 receivership why that "deal summary" was woefully inadequate and why Havens could not even
11 begin to determine whether the deal resembled anything like the deal he had previously worked
12 on with Alstom. Havens refers the court to paragraphs 29 to 32 of his declaration in support of
13 his motion to terminate the Receivership (filed on August 19, 2016, set to be heard Sept. 20,
14 2016) and Exhibit 6 of that declaration, which is the inadequate "deal summary" the Receiver
15 provided to Havens when she asked for his comments.

16 The Receiver provided a very limited summary sheet that failed to contain the deal
17 documentation (contracts with terms) and other basic terms, including to identify the exact
18 territory involved and the amount of spectrum in a particular area, and the proposed or agreed to
19 specific radio signal technical specifications, and the terms of the proposed leases. Also, the
20 Receiver did not represent in her initial summary sheet that the terms were identical or nearly
21 identical to what Havens had previously negotiated with GE Transportation (the predecessor to
22 Alstom). Only after Havens had spent time on providing his comments and objections, did the
23 Receiver reply on August 4, 2016, stating that the proposed transaction with Alstom was "nearly
24 identical" to the transaction that Havens had previously negotiated with GE Transportation, that
25 the only "substantive changes made to the transaction documents" were to take into account the
26 receivership, that GE Transportation was sold to Alstom, and that Skybridge had sold spectrum
27 previously.

1 In that August 4th reply, the Receiver said that the "transaction is quite time sensitive as
2 Alstom is eager to move forward..." However, the Receiver still failed to provide any contract
3 documentation to Havens, even though she surely had to have substantially completed contracts
4 at that time because she apparently signed the currently proposed contracts on or about August
5 8th and they are largely based on the contracts that Havens previously negotiated with Amtrak
6 and that he agreed with GE Transportation to use for this deal.

7 Now, this time the proposed Alstom sale contract attached to the Receiver's motion is
8 missing important schedules listed in Article 3 regarding the Sellers' representations and
9 warranties to Alstom. There is no excuse for the Receiver's wasting this court's time and the
10 parties' resources by submitting incomplete documentation on a major deal.

11 **IV. IMPROPER USE OF SKYBRIDGE'S MONEY AND**
12 **ASSETS TO PAY EXPENSES OF OTHER ENTITIES**

13 Finally, Havens objects to the sale due to the Receiver's improper use of Skybridge's
14 money and assets to pay expenses for other entities. In the alternative, Havens asks the court to
15 restrict use of Skybridge's sale funds to only Skybridge's non-profit purposes, as described in its
16 bylaws. Due to the Receiver's improper use of Skybridge's cash for the benefit of other
17 companies and herself, both IRS and State of CA Office of Attorney General could pursue
18 claims against the current controller of Skybridge, the Receiver, and any party colluding to
19 misuse Skybridge, such as Arnold Leong. Under the Barton Doctrine, any actions misusing
20 Skybridge's assets are outside of state court immunity.

21 DATED: September 14, 2016

22 BULLIVANT HOUSER BAILEY PC

23
24 By 

25 Andrew B. Downs

26 C. Todd Norris

27 Norman J. Rohneberg, Jr.

28 Attorneys for Defendant Warren Havens

4841-3754-7320.1

- 6 -

OPPOSITION TO RECEIVER'S MOTION FOR AN ORDER APPROVING SALE AND LEASE OF WIRELESS
SPECTRUM ASSETS TO ALSTROM SIGNALING OPERATION, LLC

PROOF OF SERVICE
Arnold Leong v. Warren Havens, et al.
Alameda Superior Court No. 2002-070640

I am employed in the City and County of San Francisco by the law firm of Bullivant Houser Bailey ("the business"), 235 Pine Street, Suite 1500, San Francisco, CA 94104. I am over the age of eighteen (18) and not a party to this action. On September 14, 2016, I served the document entitled:

**REDACTED: DEFENDANT WARREN HAVENS' MEMORANDUM OF
POINTS AND AUTHORITIES IN OPPOSITION TO RECEIVER'S
MOTION FOR AN ORDER APPROVING SALE AND LEASE OF
WIRELESS SPECTRUM ASSETS TO ALSTOM SIGNALING
OPERATION, LLC**

upon the following parties:

PAUL F. KIRSCH
JAMES M. ROBINSON
Shopoff Cavallo & Kirsch LLP
601 Montgomery Street, Suite 1110
San Francisco, CA 94111
Telephone: 415-984-1975
Facsimile: 415-984-1978
Email: paul@scklegal.com
james@scklegal.com
Attorneys for: Plaintiff ARNOLD LEONG

RICHARD W. OSMAN
Bertrand, Fox, Elliot, Osman & Wenzel
2749 Hyde Street
San Francisco, CA 94109
Telephone: 415-353-0999
Facsimile: 415-353-0990
Email: rosman@bfesf.com
Attorneys for: Plaintiff ARNOLD LEONG

GERALDINE FREEMAN
DAVID A. DEGROOT
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: 415-434-9100
Facsimile: 415-434-3947
Email: gfreeman@sheppardmullin.com
ddegroot@sheppardmullin.com
Attorneys for: Receiver SUSAN UECKER

- () **BY MAIL (CCP §1013(a)):** I am readily familiar with the ordinary practice of the business with respect to the collection and processing of correspondence for mailing with the United States Postal Service. I placed a true and correct copy of the above-titled document in an envelope addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid envelope and placed it for collection and mailing by the United States Postal Service in accordance with the ordinary practice of the business. Correspondence so placed is ordinarily deposited by the business with the United States Postal Service on the same day.
- () **BY ELECTRONIC TRANSFER:** I caused all of the pages of the above-entitled document to be sent to the recipient indicated via email at the respective email addresses. This document was transmitted by email and transmission reported without error.

1 () **BY FACSIMILE TRANSMISSION (CCP §1013(e), CRC 2.306):** I transmitted the
2 document by facsimile transmission by placing it in a facsimile machine (telephone
3 number 415-352-2701) and transmitting it to the facsimile machine telephone number
4 listed above. A transmission report was properly issued by the transmitting facsimile
5 machine. The transmission was reported as complete and without error. A true and
6 correct copy of the transmission report is attached hereto.

7 () **BY OVERNIGHT DELIVERY (CCP §1013(c)):** I am readily familiar with the
8 ordinary practice of the business with respect to the collection and processing of
9 correspondence for mailing by Express Mail and other carriers providing for overnight
10 delivery. I placed a true and correct copy of the above-titled document in an envelope
11 addressed as above, with first class postage thereon fully prepaid. I sealed the aforesaid
12 envelope and placed it for collection and mailing by Express Mail or other carrier for
13 overnight delivery in accordance with the ordinary practice of the business.
14 Correspondence so placed is ordinarily deposited by the business with Express Mail or
15 other carrier on the same day.

16 () **BY PERSONAL SERVICE UPON AN ATTORNEY (CCP §1011(a)):** I placed a
17 true and correct copy of the above-titled document in a sealed envelope addressed as
18 indicated above. I delivered said envelopes by hand to a receptionist or a person
19 authorized to accept same at the address on the envelope, or, if no person was present, by
20 leaving the envelope in a conspicuous place in the office between the hours of nine in
21 the morning and five in the afternoon.

22 () **BY HAND:** Pursuant to Code of Civil Procedure §1011, I directed said envelope to the
23 party so designated on the service list to be delivered by courier this date. A proof of
24 service by hand executed by the courier shall be filed/lodged with the court under
25 separate cover.

26 () **BY PERSONAL SERVICE UPON A PARTY (CCP §1011(b)):** I placed a true and
27 correct copy of the above-titled document in a sealed envelope addressed as indicated
28 above. I delivered each envelope by hand to a person of not less than eighteen (18)
years of age at the address listed on the envelope, between the hours of eight in the
morning and six in the evening.

I declare under penalty of perjury, under the laws of the State of California, that the
foregoing is true and correct.

Executed on September 14, 2016, at San Francisco, California.


ROBERTA C. BEACH
